## JANUARY MEETING, 1904.

THE stated meeting was held on Thursday, the 14th instant, at three o'clock, P. M; the President in the chair.

After the reading of the record of the last meeting and of the list of donors to the Library, the PRESIDENT stated that in pursuance of the vote passed at the December meeting of the Society a Memorial had been drawn up and presented to Congress, asking that the necessary measures be taken for preserving the frigate Constitution, which is in a dangerous condition of decay. The Memorial is as follows: —

*To the Senate and House of Representatives of the United States:* —

Your Memorialists, the Council of the MASSACHUSETTS HISTORICAL SOCIETY, acting under its instructions, would respectfully call the attention of your Honorable Bodies to certain facts connected with the United States frigate Constitution: —

That vessel is now lying at Charlestown, Massachusetts, in a dock also used by the steamships of the so-called White Star Line; she is dismantled, out of repair, and liable at any time to injury from carelessness or accident, if not to destruction. Your Memorialists further represent that in the American mind an historical interest attaches to the Constitution such as attaches to no other ship in maritime annals, except possibly the Santa Maria, the flag-ship of Columbus, and the Mayflower, both of which disappeared centuries ago. The Constitution still remains; and it was the Constitution which, in the gloomiest hour of the War of 1812–14, appeared "like a bright gleam in the darkness." On the 16th of August of that year, Detroit, with all its garrisons, munitions, and defences, was surrendered to the British forces; on the same day Fort Dearborn, at what is now Chicago, was in flames, and with it "the last vestige of American authority on the Western lakes disappeared." The discouragement was universal and the sense of national humiliation extreme; for it seemed doubtful if even the interior line of the Wabash could be successfully held against an enemy flushed with success. The prophet of yet other disasters immediately impending was abroad, and, according to his wont, further depressed the already

disheartened land. It was in this hour of deepest gloom, that, on the morning of Sunday, August 30, the Sabbath silence of Boston was broken and the town stirred to unwonted excitement "as the news passed through the quiet streets that the 'Constitution' was below, in the outer harbor, with Dacres," of the Guerriere, "and his crew prisoners on board." Thus it so chanced that the journal which, the next morning, informed Bostonians of the Detroit humiliation, in another column of the same issue announced that naval action which "however small the affair might appear on the general scale of the world's battles, raised the United States in one half hour to the rank of a first-class power in the world." The jealousy of the navy which had until then characterized the more recent national policy vanished forever "in the flash of Hull's first broadside." The victory, moreover, was most dramatic — a naval duel. The adversaries — not only commanders but ship's companies to a man — had sought each other out for a test of seamanship, discipline, and gunnery — arrogance and the confidence of prestige on the one side, a passionate sense of wrong on the other. They met in mid-Atlantic, — frigate to frigate. It was on the afternoon of August 19, the wind blowing fresh, the sea running high. For about an hour the two ships manœuvred for position, but at last, a few minutes before six o'clock, "they came together side-by-side, within pistol-shot, the wind almost astern, and running before it they pounded each other with all their strength. As rapidly as the guns could be worked, the 'Constitution' poured in broadside after broadside, double-shotted with round and grape, — and, without exaggeration, the echo of those guns startled the world." Of her first broadside in that action, the master of an American brig, then a captive on board the British ship, afterwards wrote: "About six o'clock I heard a tremendous explosion from the opposing frigate. The effect of her shot seemed to make the 'Guerrière' reel, and tremble as though she had received the shock of an earthquake." "In less than thirty minutes from the time we got alongside of the enemy," reported Captain Hull to the Secretary of the Navy, "she was left without a spar standing, and the hull cut to pieces in such a manner as to make it difficult to keep her above water."

The historian has truly said of that conflict, — "Isaac Hull was nephew to the unhappy General [who, three days before the Constitution overcame the Guerrière, had capitulated at Detroit], and perhaps the shattered hulk of the 'Guerrière,' which the nephew left at the bottom of the Atlantic Ocean, eight hundred miles East of Boston, was worth for the moment the whole province which the uncle had lost, eight hundred miles to the Westward. . . . No experience of history ever went to the heart of New England more directly than this victory, so peculiarly its own; but the delight was

not confined to New England, and extreme though it seemed it was still not extravagant."

Therefore it is that the Massachusetts Historical Society, already, in 1812, an organization more than twenty years in existence, now directs this Memorial to be submitted, — she, the oldest among them, speaking through her Council for all other similar Societies throughout New England. In so doing it is needless to enter into the earlier and later history of what was essentially the "Fighting Frigate" of the first American Navy; for, in the memory of the people of the United States, the Constitution is, throughout her long record, inseparably associated with feats of daring and seamanship, — devotion and dash, — than which none in all naval history are more skilful, more stirring, or more deserving of commemoration. How can they be so effectively commemorated as by the pious and lasting preservation of the ancient ship, now slowly rotting at the wharf opposite to which she was launched six years more than a century ago?

And while the name of the Constitution is thus not only synonymous with courage, seamanship, patriotism, and unbroken triumph, the ship herself is typical of a maritime architecture as extinct as the galley or the trireme. She slid from the ways at what is still known in her honor as "Constitution Wharf" in Boston harbor ten months before Nelson won the Battle of the Nile, and eight years to a day before his famous flag-ship, the Victory, bore his broad pennant in triumph through the Franco-Spanish line off Trafalgar; and your Memorialists hold that, in the eyes and minds of the people of the United States, no less an interest and sentiment attach to the Constitution than in Great Britain attach to the Victory. The Constitution in the days of our deep tribulation did more for us than ever even the flagship of Nelson did for England; and, thenceforth, she has been to Americans as a sentient being, to whom gratitude is due.

Yet by Great Britain the Victory ever has been and now is tenderly cared for and jealously preserved among the most precious of national memorials. As such, it is yearly visited by thousands, among whom Americans are not least in number. The same care has not been extended over the Constitution; and yet your Memorialists would not for a moment suggest, nor do they believe, that the people, the Parliament, or the government of Great Britain are more grateful, more patriotic, or endowed with a keener sense of pride than the people, the Congress, or the Administration of the United States. As for the people, the contrary is, in case of the Constitution, incontrovertibly proven by the names of the thousands of pilgrims from all sections of the country annually inscribed on her register. So far as the Government is concerned, its failure to take measures for the lasting preservation of the old ship has been due,

in the opinion of your Memorialists, neither to indifference nor to an unworthy spirit of thrift, but to the fact that, amid the multifarious matters calling for immediate action, the preserving of an old-time frigate, even though freighted with glorious memories, has been somewhat unduly, though not perhaps unnaturally, deferred to a more opportune occasion.

None the less, the Constitution "is the yet living monument, not alone of her own victories, but of the men behind the guns who won them. She speaks to us of patriotism and courage, of the devotion to an idea and to a sentiment for which men laid down their lives." Therefore, your Memorialists would respectfully ask that immediate provision be made to the end that the course pursued by the British Admiralty in the case of the Victory may be pursued by our Navy Department in the case of the Constitution. We accordingly pray your Honorable Bodies that the necessary steps forthwith be taken for preserving the "Fighting Frigate" of 1812; that she be renewed, put in commission as a training ship, and at suitable seasons be in future stationed at points along our coast where she may be easily accessible to that large and ever-increasing number of American citizens who, retaining a sense of affection, as well as deep gratitude, to her, feel also a patriotic and an abiding interest in the associations which the frigate Constitution will never cease to recall.

And your Memorialists will ever pray, &c.

CHARLES FRANCIS ADAMS, *President*,
SAMUEL A. GREEN, *Vice-President*,
THOMAS JEFFERSON COOLIDGE, *Second Vice-President*,
EDWARD J. YOUNG, *Recording Secretary*,
HENRY W. HAYNES, *Corresponding Secretary*,
CHARLES C. SMITH, *Treasurer*,
HENRY F. JENKS, *Cabinet Keeper*,
ANDREW MCFARLAND DAVIS,
ARCHIBALD CARY COOLIDGE,
WILLIAM R. THAYER,
S. LOTHROP THORNDIKE,
JAMES F. HUNNEWELL,
JAMES DE NORMANDIE,
*Members constituting the Council of the Society.*

BOSTON, December 30, 1903.

The President then called on Capt. ALFRED T. MAHAN, a Corresponding Member, who spoke as follows: —

It would doubtless be an exaggeration to speak of the combat between the Constitution and the Guerrière as the

birth of the United States navy, for that would be to ignore the notable episodes of the Tripolitan hostilities, and the few brilliant engagements of the *quasi*-war with France in 1798; but "resurrection" is not too strong a word to characterize the effect produced upon the nation by the news that an American frigate had captured one of Great Britain, in a fight which was believed to be on equal terms. We know now that there was a very considerable disparity of material force between the two antagonists on that celebrated occasion; but we also know that the United States vessel, although it was but two months since war was declared, was in a state of efficiency, used her guns, and was handled with an ability which is the true and final test of military merit. Therefore, although the exultation of the nation proceeded in some measure on imperfect comprehension, it had a solid foundation in fact. That the Constitution was superior in force to the Guerrière is incidental only, — a matter of relative values; but that she did her work with a precision and rapidity which showed her fully capable of meeting an equal on equal terms, is a condition of positive attainment, in which pride may justly be felt. It is the deserving of success, as compared with achieving it.

It is, perhaps, not generally known, or, if known, not appreciated, how near the United States navy then was to absolute extinction by national act. It had been blood-let, starved, and emasculated, under the gunboat policy of Jefferson, until nothing saved it from complete exhaustion but the spirit and tone of its officers. With the exception of a few intelligent supporters from the maritime part of the country, — notably, of course, New England and New York, — nobody believed in it. This, again, was a reflection of Jefferson. In strict line of the tradition received from him, it was seriously proposed to lay the navy up, out of harm's way, when war began. Mr. Monroe, in his correspondence recently published, — the last volume has but just been issued, — mentions at length the discussion that went on, and the arguments on either side. He himself, the Secretary of State, leaned to the Jeffersonian idea, if I remember right. I have heard, all my life, the naval tradition that only a remonstrance from two or three naval captains obtained a reversal of this intention; but it was only the other day I came across this

chapter and verse confirmation of the report. Within four months of the declaration of war, known to be imminent, Congress positively and *in toto* refused to make any addition to the navy, which was weaker in material strength than when John Adams quitted office, eleven years before.

It was to such a condition of contemptuous governmental neglect, representing, doubtless, general popular apathy, that the news of the capture of the Guerrière came, following close on the heels of the news of the surrender of Hull and his untrained army. The revulsion of popular feeling was immediate and lasting. In the list of naval victories which every schoolboy knows by heart, the name of the Constitution maintains its pre-eminence. She has been the idealization of the United States navy; and not even Farragut's historic flagship, the Hartford, with all her renowned achievements, has been able to supplant her in popular imagination. It is no exaggeration to say that her victory over the Guerrière was the first throb of a new life which since that day has pulsed with vigor ever increasing; and in direct descent from it are to be traced the famous naval names of New Orleans, Vicksburg, Port Hudson, Mobile, Manila, Santiago.

Mr. Thomas Minns was elected a Resident Member; and Mr. Sidney Lee, of London, England, a Corresponding Member.

Mr. Henry W. Haynes presented, in behalf of the Hon. GEORGE F. HOAR, a memoir of the late Hon. Horace Gray which Mr. Hoar had written for publication in the Proceedings.

The PRESIDENT then read parts of the following paper: —

The Society will remember that, at our October meeting, I read a paper[1] wherein I endeavored to precipitate, so to speak, some residuum of historical fact from certain personal reminiscences contained in a speech delivered by the late Abram S. Hewitt at a Chamber of Commerce meeting, held in New York on the 7th of February, 1901, commemorative of Queen Victoria. A close analysis failed to yield any such residuum, even the least; and I found myself compelled to the conclu-

[1] Proceedings, second series, vol. xvii. pp. 439–448.

sion that the reminiscences in question were, in their essentials, purely imagined. In all my previous experience with statements based wholly on memory, of the same general character as those of Mr. Hewitt, this has so very rarely occurred that my curiosity was excited. Accordingly, I have since continued my investigations. Though I greatly regret it, I find myself compelled to say they have resulted in absolutely nothing more than a growing conviction that, at some remote period, Mr. Hewitt must have dreamed a very vivid dream. During his recent visit here Mr. Schurz incidentally told me that the story was one Mr. Hewitt was in his later years fond of repeating, and that he had himself often heard it before he saw it in the report of the Chamber of Commerce meeting. My final inference, therefore, is that it was a not unusual case of what may fairly enough be described as belief from frequent iteration. A curious parallel instance of this came to my notice a few days ago in the case of an acquaintance of mine, — a man not quite sixty. He told me how he had for years been in the habit of describing his vivid recollection of being taken as a child by his father down to and upon the frozen Boston harbor, in that famous winter (1844) when a channel was cut through the ice to enable the outward bound Cunard steamer to get off on her advertised sailing day. My friend had been wont to tell how, with his hand in that of his father, he had watched the unusual scene with a childish interest, and still remembered distinctly every detail of it. But at last on some occasion he chanced to repeat this story in presence of a friend slightly older than himself, who at once proceeded to question it. My acquaintance simply smiled, inquiring how it was possible for him so vividly to recall what he had never seen. The next day, however, he was confronted with the irrefutable chronology of recorded events; and, to his utter discomfiture, he found he was just six days old when that had occurred every detail of which in his more mature years he so distinctly recalled. In this case my friend's father had unquestionably witnessed the famous scene, afterwards so long referred to in Boston business circles. He probably had with him one of his children, an older brother of my friend. In after years the father was fond of describing the incident, but became confused as to which particular one of his offspring accompanied him. The rest followed. Except as respects his age at the

time the thing occurred, it was, I fancy, much the same in Mr. Hewitt's case.

However this may be, at the close of my previous paper I intimated an intention of following this subject further, but in a more general way. To quote my own words, — "The Hewitt reminiscence naturally leads up to another Civil War legend. I refer to the accepted tradition, now become almost an article of American faith, — that somehow and in some way the cause of the Union was in its hour of trial dear to Queen Victoria, and that we of the North were then under deep and peculiar obligation to her. . . . I have been quite unable to find any definite historical basis for this pleasing sentiment. Hereafter, and in the present connection, I propose to have on that topic also something to say." The results of my further inquiry I now submit.

It was on the 7th of February, 1901, that Mr. Hewitt put on record his hearsay recollection of the interview between Queen Victoria and Mr. Adams; that apocryphal interview, amid domestic surroundings, in which the former declared herself so unreservedly against anything which might lead to hostilities between Great Britain and the United States. Almost exactly a year later Prince Henry of Prussia came to Boston in the course of his tour through the United States, and, on the 6th of March, 1902, an honorary degree was conferred upon him by Harvard University. In the carefully prepared address delivered in Sanders Theatre by our associate President Eliot, when conferring the degree, occurred the following: "Universities have long memories. Forty years ago the American Union was in deadly peril, and thousands of its young men were bleeding and dying for it. It is credibly reported that at a very critical moment the Queen of England said to her prime minister, 'My Lord, you must understand that I shall sign no paper which means war with the United States.' The grandson of that illustrious woman is sitting with us here."

To much the same effect, though nearly thirty years earlier, Mr. Joseph H. Choate thus expressed himself at a reception tendered that very true friend of ours, the Right Hon. William E. Forster, at the Union League Club of New York City, December 14, 1874: "We shall probably find out that we had [in Great Britain, during the war of Secession] more friends

than we knew, both in Parliament and in the Government; and there is the best of reasons for believing that that gracious lady, the Queen herself, was from the first to the last an obstinately faithful ally of America, and was utterly averse to anything that might tend to a breach of the peace with her dearest ally."

Here in two instances, far removed from each other both in place and time, was Mr. Hewitt's story, appearing and reappearing in a slightly different form. Mr. Choate adduced in support of his statement a letter from Thurlow Weed, telling the familiar and to us pathetic story of Prince Albert's suggested modifications of Earl Russell's first draught of a despatch to Lord Lyons, in November, 1861, when news of the Mason-Slidell seizure on the Trent reached England. I have not written to Mr. Choate to learn whether he then had, or now has, any other information throwing light on the Queen's subsequent attitude as "from the first to the last [that of] an obstinately faithful ally," but I intend so to do. He may have known more than he told then, hearing it possibly from Mr. Hewitt; he may have learned more since, during his service in London. This I propose presently to ascertain. The somewhat carefully guarded statement of President Eliot was, however, both more recent and more specific. The language quoted by him as that made use of by the Queen was substantially the same as that contained in the Hewitt reminiscence; but it was, in this version, uttered to her Minister and not to the representative of a foreign country, and that country the one directly involved. In so far the Eliot version bore an aspect of much greater probability than the Hewitt version. The Eliot version was, humanly speaking, at least possible; this can scarcely be said of the Hewitt version. Accordingly, I wrote to President Eliot asking his authority for the striking statement thus made by him; if, indeed, he had any authority except Mr. Hewitt's then comparatively recent utterance. I promptly received the following reply: —

"In 1874 I was at Oxford for a week. Dr. Acland, to whom I had a letter, procured for me an invitation to lunch with Prince Leopold, who was then living with a tutor in a small house at Oxford and going to some lectures. Dr. Acland went with me, and we were four at the table. In the course of the luncheon the Prince told the story of the Queen's interview with Lord Russell, Dr. Acland prompting him to do

so. He gave no authorities and said nothing about the source of his information. He must have been a small boy at the time of this interview with the Queen. Dr. Acland spoke of the story as if he believed it. Naturally I remembered the Prince's statement, but I do not know that I ever have talked about it. Quite lately — that is, since last March — I heard somebody else attribute this statement to Prince Leopold, but I have now forgotten who that somebody else was. I have never seen any real authority for it, and that is the reason I used the expression 'credibly stated.'"

It thus appears that President Eliot spoke from his own recollection of what he had twenty-seven years previously been told by a youth of twenty-one of an occurrence and conversation which must have taken place at least twelve years before that, and when the youth in question was still a boy; for Prince Leopold, born in April, 1853, was, in 1862, as yet a child of nine. Nevertheless, here is authority, such as it is. Sir Henry Acland was in 1874 a man of fifty-nine. He had been in America, a member of the suite of the Prince of Wales during his memorable tour of 1860. In 1874 he was Regius Professor of Medicine at Oxford, and honorary physician to Prince Leopold, then an undergraduate. Thus a man very competent to form an opinion on such a point, and so situated as to have special sources of information thereon, intimated a belief in the story. This is corroborative evidence too strong to be lightly brushed aside. It indicates clearly and indisputably that an accepted tradition prevailed in the royal family and about Windsor Castle, that, at some period of crisis in the course of our Civil War, Queen Victoria did take a decided stand with the Ministry in opposition to anything calculated to provoke hostilities with the United States. Accepted traditions are rarely without some foundation of fact.

After very careful investigation my belief is that something of the kind described did occur, and that the policy of the Palmerston-Russell government was gravely influenced thereby: but I incline to think it occurred at Gotha or Balmoral, and not at Windsor; and, finally, that it was in the late summer or early autumn of 1862. For this conclusion I will now give my reasons, wholly irrespective of Mr. Hewitt's Chamber of Commerce address. For my belief is that Mr. Hewitt's reminiscence gradually assumed form in his mind in consequence of his having heard at the time, through the

gossip of London and Paris, vague echoes of something whispered about as having recently happened at Gotha, or elsewhere. This gossip he gradually confounded in memory with talk and incidents in his intercourse with Mr. Adams.

But to get at the probabilities in the case it is necessary to go far back, and obtain a correct understanding of the way in which, at the time in question, the Queen and her principal advisers viewed the situation of affairs and course of events, so far as the troubles in America were concerned. I do not propose in this connection to enter into any elaborate analysis of the character of Queen Victoria. Indeed, were I to attempt so to do, I should have none but the most general sources of information from which to draw my inferences. It is sufficient for my present purpose to call attention to a very noticeable article, entitled "The Character of Queen Victoria," which appeared in the Quarterly Review shortly after her death.[1]

This article, the authorship of which, only surmised, has never been publicly avowed, was evidently prepared by a practised writer, probably in collaboration with some woman, presumably of rank, who enjoyed long and peculiar means of intimate observation of the royal family. From what is said in this paper, — which at the time occasioned a great deal of talk in England, — several points of much significance in the present connection may safely be educed. Neither naturally, nor under the shaping influence of the Prince Consort, did the Queen have any bias towards democracy. It was Francis Joseph of Austria who on some occasion remarked, "Royalty is my business"; and Queen Victoria might well have so said. Throughout her entire life she bore herself in the spirit of the apothegm; and towards democracy in all its aspects and wherever existing, she felt an instinctive aversion. An ingrained Jacobite, one of her "strongest traits was her partiality for the Stuarts; she forgave them all their faults. She used to say, 'I am far more proud of my Stuart than of my Hanoverian ancestors'; and of the latter indeed she very seldom spoke." She would permit of no disparagement of even poor old James II.; and Dean Stanley used to say that, in character, she much resembled Queen Elizabeth, — who, by

[1] Referred to by Mr. Morley in his Life of Gladstone (vol. ii. p. 425) as "the remarkable article in the Quarterly Review," No. 386, April, 1901, p. 320.

the way, she particularly disliked. "When she faces you down with her 'It must be,'" the Dean declared, "I don't know whether it is Victoria or Elizabeth who is speaking." In the social life of the Palace also there was nothing of the *bourgeois* Queen about Victoria. She was insistent on court etiquette, and the picture given in the article in the Quarterly of the German evenings at Windsor is extremely suggestive. "The Royalties stood together on the rug in front of the fire, a station which none durst hold but they; and amusing incidents occurred in connection with this sacred object." Thus the Queen was utterly devoid of what may be termed sympathy for those democratic institutions of which the American Union was the great exponent among the nations, or for any movement in that direction. On the other hand, she had an instinctive dread of war, and of all foreign complications likely to result in war. Moreover, she had in 1860 been gratified, and even touched, by the warm welcome everywhere extended to the Prince of Wales by the great English-speaking community across the Atlantic. The recollection of it was still fresh in memory when the issues of the Civil War presented themselves. A single thing more remains to be said. Queen Victoria was in one important respect the true grandchild of George III., our old revolutionary *bête noir*. To quote again, and for the last time, from the article in the Quarterly: "No one that knew her late Majesty well will be inclined to deny that her extraordinary pertinacity, her ingrained inability to drop an idea which she had fairly seized, might naturally have developed into obstinacy. By nature she certainly was what could only be called obstinate, but the extraordinary number of opposite objects upon which her will was incessantly exercised saved her from the consequences of this defect." This final saving clause was of course naturally limited to normal conditions. It would be wholly safe on the other hand to surmise that the latent peculiarity of character here alluded to would, in her case as in the case of her grandfather, become morbidly active in presence of sufficiently exciting causes or under an excessive nervous strain.

Such was the Queen, a factor in the political conditions of her kingdom which no minister or combination of ministers was, during her long reign, ever able to ignore or even over-

ride. The royal sphere might be limited, and closely hedged about; but it was there, and within it her Majesty was supreme. During the entire period of our Civil War the so-called Palmerston-Russell ministry was in power. Formed in June, 1859, with an understanding between the two chiefs that either who might be sent for by the Queen would accept office under the other, it was "looked upon as the strongest administration ever formed, so far as the individual talents of its members were concerned."[1] And this fact of the individuality and character of those composing the ministry became subsequently of great importance in deciding the policy to be pursued at the critical period of our Civil War. The ministry remained in firm control of the government from June, 1859, until the death of Lord Palmerston in October, 1865. The three leading characters in it were Lord Palmerston, Premier, Lord John Russell, — created Earl Russell in July, 1861, — Secretary for Foreign Affairs, and Mr. Gladstone, Chancellor of the Exchequer.

It is not necessary in this paper, nor is it my purpose, again to thrash over the old historical material relating to the attitude and feelings of these men towards America during our conflict. The ground has been sufficiently covered, and the essential facts in the case are well established and familiar. In regard to them, therefore, I shall merely refer to the standard works, confining myself to the production of such new material as I have chanced upon in the course of recent investigations in connection with the inquiry now in hand.

In the first place, as respects Lord Palmerston. It has always been assumed that, from the very commencement of our troubles, his sympathies were with the Confederates, and that his instincts as a member and representative of the British privileged classes were hostile to the more democratic North. There can, I fancy, be no question that this was so. Nevertheless, during the earliest stages of the struggle, and before the Trent affair gave a decided adverse bent to the Premier's feelings, there was room for question. At first he seems to have regarded both parties to the quarrel with indifference, and, apparently, equal dislike. He cared not which whipped. Even as late as October 18th, — only twenty-one days before the seizure of Mason and Slidell, — the Pre-

[1] Ashley's Lord Palmerston (ed. 1879), vol. ii. p. 364.

mier thus wrote to the Foreign Secretary: "As to North America, our best and true policy seems to be to go on as we have begun, and to keep quite clear of the conflict between North and South. . . . The love of quarrelling and fighting is inherent in man, and to prevent its indulgence is to impose restraints on natural liberty. . . . I quite agree with you that the want of cotton would not justify such a proceeding. . . The only thing to do seems to be to lie on our oars and to give no pretext to the Washingtonians to quarrel with us, while, on the other hand, we maintain our rights and those of our fellow countrymen."[1]

Thus Palmerston was writing to Earl Russell, he then being at Broadlands and the Foreign Secretary in attendance on the Queen, who was still at Balmoral. Meanwhile Mr. John Lothrop Motley was at that juncture in Great Britain. He had in August been appointed to the Austrian mission, and, on his way to Vienna, necessarily passed through England. Mr. Seward, newly installed in his office of Secretary of State, was then eager to inform himself through all possible channels as to the state of affairs in Europe, and the views of our conflict held by public men, especially those of Great Britain and France. Mr. Motley's English acquaintance was exceptionally large; indeed there were few persons he could not reach. Deeply interested in the Union cause, he now made frequent reports of a semi-official character to the Secretary of State. These, I believe, have not yet been published. In them I find the following highly interesting accounts of interviews and conversations with Earl Russell and the Queen, and the writer's impressions as to the views and tendencies of Palmerston:—

"I had addressed a note to Lord Russell (who, as I understood, was at his country house called Abergeldie in the north of Scotland) saying that I had just returned to this country from America, and that, before I departed for Vienna, I should be glad to accept an invitation often made by him, that I should visit him in Scotland. The answer came by return of post, that he would be delighted to see me at once, and that he hoped I would stay as long as I could.

"On the ninth of September I reached Abergeldie, where, however, my engagements did not permit me to stay longer than a day and a half. During this time, I had many full conversations with him

[1] Ashley's Palmerston, vol. ii. p. 411.

of several hours duration. I believe that we discussed the American question in all its bearings, and he was frank and apparently sincere in his expressions of amity towards the United States, and in deprecation of a rupture or of serious misunderstanding. . . .

"I spoke to him of the report alluded to by the editor of the Spectator, that England would recognise the Confederacy in November. He smiled, and said that it was a pure fiction; that no such purpose existed. He discussed this matter at considerable length and alluded to the practice of nations to recognise *de facto* governments, when they had become facts; observing that such things went more rapidly in modern times than they did of old; but saying distinctly, and repeating it many times, that the government were not thinking of recognising the Southern confederacy, at present; that it was impossible to know what events might happen in the future, that the U. States government itself might ultimately recognise the seceding states, and that the English government could not be expected to pledge itself never to do what might, at some future period, be done by ourselves. At present, no such intention existed. He had been asked recently, in writing, by the Southern commissioners whether they were to obtain recognition, and, said he, 'I told them, no.' He added that he had seen them but twice, on their first arrival, some months ago. Since then, he had refused all personal interviews with them. He spoke of the tone of the press in America towards England; and I replied that it had been caused by the venomous language, and persistent and relentless malignity of the leading London journals; that there had never been more friendly feelings on the part of the American people towards this country than just before the outbreak of our troubles, but that the cold and scrupulous 'neutrality' not only of action but of sentiment paraded by England, had first surprised and then deeply offended the people, and that, on my arrival in America, I had found one universal feeling of bitterness even among those who had loved England most, which it was almost impossible to struggle against. I said that it was to me astonishing that when we had become involved in a civil war, because we had at last dethroned the slave power (for enduring the despotism of which we had so long been taunted by England) had limited the extension of slavery, had proclaimed the territories to be free soil and had established liberty as national and slavery as sectional, we should be censured and reviled by the English press, be refused one word of public sympathy from public men, should find our disasters mocked at by the leading journals and the triumphs of our enemies rejoiced in, and our struggles to maintain our place among the nations and to preserve the existence of our great republic, either derided or condemned as hopeless.

"He said that he could not censure our course; nor see how we

could have avoided the war. He did not wonder at our determination to put down the insurrection; but added that it was of so extensive a character, and was spread over so wide a surface, as to make our task seem a very formidable one. Five millions of people he thought hard to subdue, when fighting on their own soil; but he had no disposition to prejudge the case. He admitted the possibility of our efforts being successful, but thought that the effect of the Bull's Run affair would be to encourage the confederates. He spoke very reasonably of that event, and did not attribute any great consequence to the panic, because it was well known that this was not uncommon among raw levies and volunteers, who might afterwards become the best of soldiers. He thought that much less effect had been produced in England by the defeat and the rout, than by the circumstance of so many regiments leaving on the eve of active operations, because their term of enlistment had expired. This fact — more than anything else — had inspired distrust in our cause, because it would seem to argue the dying out of that enthusiasm for the war, which had been so conspicuous at first. . . .

"In speaking of the relations between our two countries, he said that — as in many similar cases — mutual distrust had produced mischief. England and America seemed each to suspect the other of hostile intentions, while it was probable that both were quite mistaken. He asserted, very earnestly, that the United States need fear no complications or quarrels with European powers, unless they were of our own seeking. No foreign nation wished to meddle with us. . . .

"Of course the subject of blockade was discussed. I said that in the Southern States there was the utmost confidence expressed that Great Britain would break our blockade, so soon as the cotton famine became imminent. It was notorious that the whole insurrection had been founded upon the theory that Great Britain could not exist without American cotton, and that therefore she could be relied upon to come to their rescue, after the United States should have effectually blockaded the cotton ports. The South believes itself possessed of the power of life and death over England by means of this single product, and therefore felt sure of forcing her into an alliance and into hostility to the United States. On the other hand, there was doubtless great uneasiness on the subject in the free states. To blockade the coast was one of the most indisputable of belligerent rights, and a forcible infringement by neutral governments of an effectual blockade was of course tantamount to a declaration of war. There was much anxiety therefore lest the stress of cotton should lead to war on the part of Great Britain. In this case, the consequences to humanity would be most disastrous. Without reference to the damage which each nation might inflict on the other, it was sufficient to intimate that the first effect of an infringe-

ment of the blockade and consequently of war made on the United States by Great Britain or by France, or by both united, would be a proclamation of universal emancipation of the slaves. I felt convinced that the people of the free states, finding themselves unjustly and illegally assailed by foreign powers, when engaged with this formidable domestic insurrection would instantly demand this measure in tones which no government could resist. The horrors of the French revolution had been mainly produced by the unwarrantable interference of foreign powers at the outset, and all the terrible results which might, at the present American crisis, flow from sudden and forcible emancipation, — bloodshed, servile insurrections, and the total destruction of the cotton cultivation for years, — would be justly laid at the doors of the foreign nations whose hostile proceedings should come to aggravate our domestic calamities. So long as the insurrection failed in securing a foreign alliance we felt confident of suppressing the great mutiny against constituted and benignant authority, without resorting to this last and most effective weapon. But, should there be a foreign combination against us, in the interest of cotton spinners and in defence of the slavery power, I had never heard of any person in the free states, whatever his politics, who doubted that general emancipation would be proclaimed.

"Lord Russell seemed impressed with these views, but suggested that such a measure would be but a *brutum fulmen* — as we were ostensibly engaged in a war to maintain the constitution and as the constitution forbade interference with slavery in the states. I answered that the whole aspect of affairs would be changed by the combination suggested, that the war would then become a war to the knife, a struggle for existence against enemies foreign and domestic, that society would be resolved into its elements, and that no man could measure the consequences of such a revolution; but that the people of the free states would feel themselves relieved from all responsibility for the measures necessary for their own preservation. I said that I felt that a combination between England and France to break our blockade would be one of the great crimes of history, and would be so recorded forever. I did not press this subject, however, for he most distinctly agreed with me in this opinion, and said that for England or any other power to break the blockade, legally and effectually established, would be entirely unjustifiable, and that the English government had no intention whatever of doing it. He repeated, in a grave and earnest manner, that they had never contemplated such a step. . . . He was well aware, he said, of the power which the South thought itself possessed of over foreign nations by means of their cotton, and he sympathised with the general impatience of England under this supposed monopoly. The government was doing, would do, what it could to foster the produc-

tion of cotton in India and other countries, and he felt hopeful of the result. He alluded to the resolution taken by the South to forbid the exportation of cotton, and showed me a familiar note to himself from Lord Palmerston on that subject, saying — 'We are up to that dodge.'

"I have detailed, at some length, our conversations, which were almost continuous during the greater part of my day and a half's visit, because I think such notices paint the attitude of the English government at the present moment, towards us, as fairly as could be done by more formal disquisitions. On the whole, it may be said that our destiny is in our own hands. There will be a reluctance on the part of England, France, and other foreign nations to interfere with our domestic quarrel, and no power is likely to recognise the Confederacy until, after a reasonable time, it shall appear manifest that the United States government is incapable of suppressing the mutiny and restoring the Union. That, as a matter of speculation, the European powers are incredulous of our capacity to accomplish the task to which we have set ourselves, is tolerably certain. At the same time they mean to remain expectant and attentive, and will readily be convinced of the justice of our cause by the logic of a few conclusive victories in the field. No other argument is likely to produce much effect. It is thoroughly understood here, that the war must go on, — that peace, for the present, is impossible. But foreign powers are not yet disposed to interfere. Lord Russell expressed the opinion that we were perhaps too heedful of the criticism and sentiments of foreign nations, and that such sensitiveness would seem to denote a want of confidence in ourselves and in the strength of our institutions, which he regretted. I answered that the observation was, to a certain extent, just, but that our anxiety was, at present, rather in regard to the probable acts of other nations, than to their opinions. If we were satisfied that foreign governments would leave us alone, to deal with the mutiny as we best could, we should soon show a stoicism and indifference towards neutral powers, equal to their own. England, by the press and proclamations, had cured us of sentimental yearnings for sympathy.

"It so happened, that in the morning prayers which Lord Russell, according to the habit of all English gentlemen, read to his household that day he read the chapter in which the passage occurs, 'the stone which the builders rejected, the same hath become the head of the corner,' etc. I commented to him on the oddity of the circumstance that he should have read these words to-day, for he was doubtless aware of the use which had been made of the text by a prominent personage in the Southern 'confederacy.' He replied that he remembered the quotation very well; — 'the stone,' (slavery) which the builders (the framers of the constitution) had rejected, had now become the corner stone of the new confederacy. This led to much talk in respect to

the African slave trade, and I told him it seemed almost puerile to suppose that the Southern Confederacy, if once established and recognised by foreign powers, would not reopen that traffic; that their intentions on that subject were notorious, and were among the principal causes of the attempt to destroy the union; that proofs without end might be accumulated on this point, if evidence could be deemed necessary. He answered that he was fully instructed on this subject; and that although the representations made to the English government by the confederates were to the contrary effect, — the whole movement being described by them as one of free trade, and of resistance to Northern manufacturers and monopolists, — yet that there had been much information received from English consuls and others on whom they relied, as to the openly avowed intentions on the part of the South to reopen the African slave trade.

"On the morning after my arrival, Lord Russell mentioned to me at breakfast, that the Queen, then residing at Balmoral, about a mile and a half from Abergeldie, was aware that I was making him a brief visit and that I was to leave early next morning. She had accordingly sent to say that the Prince Consort as well as herself would be pleased if I would come to Balmoral that afternoon. As I had said nothing on the subject, myself, and had never been presented at the Court of St. James, I considered this attention as a marked civility not to myself, but to the United States of which government I have the honor to be one of the foreign representatives; and I expressed my satisfaction in that sense, to Lord Russell.

"In the afternoon he took me to Balmoral in the carriage, and we were received by the Prince Consort in the most informal and agreeable manner. The conversation was of some twenty minutes duration, and was strictly limited to commonplace subjects, without reference to politics; but the Prince Consort took especial pains, I thought, to be polite and friendly, and certainly produced a most pleasing impression upon me. While we were conversing, the door opened, and her Majesty walked, quite unattended, into the room, dressed in plain, black, morning costume. The Prince Consort presented me, and I was received with much affability; the Queen making a gracious observation in regard to myself, which I forbear to repeat, and then speaking at once, and with warmth, of the great pleasure which she had derived from the reception which the Prince of Wales had met with in America last year. The Prince Consort also expressed himself with eagerness on this subject, and alluded to the very great delight which the young Prince himself had experienced in his tour and in the friendly greeting which he had received from our nation.

"Nothing else, worthy to be repeated, was said, but I thought it my duty to mention the incident; for it seemed intended as a mark of re-

spect and goodwill to the United States. Her Majesty need not have seemed aware of my very brief visit to the neighborhood of Balmoral; but I do not wish to attribute more importance to the matter than it deserves.

"On our way back, I observed to Lord Russell that the Queen and Prince Consort seemed carefully to have abstained from any allusion to politics.

"He said — 'Yes — of course — for neither would choose to appear as interfering with the constitutional advisers of the crown.' He added however, that the Prince had asked him, on his coming into the room, a few minutes before I was introduced, 'well, what about recognition,' or something to that effect; and that he had answered, 'no, we are not thinking of that at present; we are not prepared to recognise the Southern confederacy.' 'I suppose you mean,' said the Prince Consort, 'that you don't intend to pledge yourself for all time, never to do it, whatever events might happen.' 'Yes,' answered Lord Russell, 'we can't look into all the future — but, for the present, we have no intention of recognising them.'

"He added, on my departure from Abergeldie, 'Tell Mr. Adams, that we are not thinking of recognising the Southern Confederacy.'

"On my taking leave of Lady Russell, she said to me; 'God grant that there may be no rupture, no ill blood between our two countries. Such an event is dreadful to contemplate.'

". . . I expect to have some conversation, very soon, with Lord Palmerston, either at his house in town or at Broadlands. He is not yet returned from Walmer Castle, but is expected daily. I shall report to you of this, in my next . . ."

The next letter from Mr. Motley was dated "Vienna, Nov. /61." In it he wrote: —

"In the present administration and its supporters, I know that we have many warm friends, warmer in their sentiments towards us than it would be safe for them in the present state of parties to avow. Lord Palmerston is not one of these friends. He knows little of our politics or condition, and cares less for them; and he is reckless of consequences should we give him good and popular cause of quarrel. But he is too adroit to place himself technically and flagrantly in the wrong; and therefore all fears that there would be a forcible infringement of our blockade have always seemed to me quite groundless."

It is important to note the date — September 9, 1861 — of the visit and conversations thus so graphically described. It was two months to a day before the occurrence of the Trent

affair, and eighty days only before all England was set aflame by the arrival (November 27) of the news of that affair. The attitude towards things American of the British ministry at the earlier date was thus explicitly set forth. It certainly presented no grounds for complaint on our part. The glimpse given of the royal family is also suggestive.

Up to this time (September, 1861), the recently appointed American Minister, Mr. Adams, had met Lord Palmerston merely in an official capacity and in the most formal way. He had been in London nearly five months; but he had arrived when the season was already well advanced towards its later stages, and had seen the Premier only on state occasions, or from the gallery of the House of Commons. Towards the end of September he had made a flying visit to Scotland at the invitation of Earl Russell, and had there been the guest of the latter at Abergeldie Castle for a single day (September 25), occupied with official business. Mr. Motley had preceded him as a guest by about two weeks. While there Lady Russell had driven Mr. Adams through the Balmoral grounds, but he had seen nothing of the royal family. Subsequently, on the 9th of November, he had been one of the guests and speakers at the Lord Mayor's dinner, at which the Premier was a prominent figure. What the Premier says at the annual Guildhall dinner is apt to be significant. On this occasion Mr. Adams listened with the keenest interest. The struggle in America was the issue then uppermost in all men's minds, the cotton market was excited, and it was not improbable that the policy of the government might on this occasion be shadowed forth in anticipation of the meeting of Parliament. The impression left on Mr. Adams's mind was favorable. He referred to what Lord Palmerston said as being marked by his "customary shrewdness," adding, — "He touched gently on our difficulties; and, at the same time, gave it clearly to be understood that there was to be no interference for the sake of cotton." This was on the 9th of November; and, the very day before, the steamer Trent had been stopped in the Old Bahama Channel, some four thousand miles away, and Messrs. Mason and Slidell taken from her. Eighteen days later, on the 27th, the occurrence became known in England. Such a contingency had, however, already suggested itself to the authorities as a possibility, and the opinion of the law officers

of the crown asked upon it. Mr. Adams now had his first interview with Lord Palmerston. Of it he immediately afterwards made the following diary record: —

"*Tuesday, 12th November*, 1861: — Received a familiar note from Lord Palmerston asking me to call at his house and see him between one and two o'clock. This took me by surprise, and I speculated on the cause for some time without any satisfaction. At one o'clock I drove from my house over to his, Cambridge House in Piccadilly. In a few minutes he saw me. His reception was very cordial and frank. He said he had been made anxious by a notice that a United States armed vessel had lately put in to Southampton to get coal and supplies.[1] It had been intimated to him that the object was to intercept the two men, Messrs. Slidell and Mason, who were understood to be aboard the British West India steamer expected to arrive to-morrow or next day. He had been informed that the Captain, having got gloriously drunk on brandy on Sunday, had dropped down to the mouth of the river yesterday, as if on the watch. He did not pretend to judge absolutely of the question whether we had a right to stop a foreign vessel for such a purpose as was indicated. Even admitting that we might claim it, it was yet very doubtful whether the exercise of it in this way could lead to any good. The effect of it here would be unfavorable, as it would seem as if the vessel had come in here to be filled with coal and supplies, and the Captain had enjoyed the hospitality of the country in filling his stomach with brandy, only to rush out of the harbor and commit violence upon their flag. Neither did the object to be gained seem commensurate with the risk. For it was surely of no consequence whether one or two more men were added to the two or three who had already been so long here. They would scarcely make a difference in the action of the government after once having made up its mind. He was then going on to another question, when I asked leave to interrupt him so far as to reply on this point. I would first venture to ask him if he would enlighten me as to the sources of information upon which he imputed the intention

[1] The United States steamer James Adger, Commander John B. Marchand, had left New York October 16, under orders to intercept, if possible, the Confederate steamer Nashville, which ran the blockade at Charleston on the night of October 10, 1861, and was falsely reported to have Messrs. Mason and Slidell on board, presumably destined for some European port. The Confederate commissioners in fact left Charleston on the Theodora two days later, on the night of October 12. The following day they arrived at Nassau, their immediate destination; and thence went to Cuba, still on the Theodora, landing at Cardenas. The orders under which Commander Marchand sailed were given under an entire misapprehension of facts, and his instructions related exclusively to the Nashville. See the Official Records of the Union and Confederate Navies in the War of the Rebellion, series I., vol. i. pp. 113, 114, 128, 224–227.

of Captain Marchand to take such a step. His Lordship answered that he had no positive information, but that his belief rested on inferences of the motive for sending the vessel so far, and the coincidence in her time of departure. To this I remarked that Captain Marchand had been to see me, and had shown me the instructions under which he sailed. The object of the government had been, upon receiving information that the steamer Nashville from Charleston had succeeded in breaking the blockade and was proceeding with these men on a voyage to Europe, to despatch vessels in several directions with the design of intercepting and capturing her. I presumed that no objection could exist to such a proceeding on our part. His Lordship assented, though he did not seem to have heard of the Nashville or to understand its destination. I then said that the James Adger had been sent in this direction, but finding no news of the Nashville, and learning that the two emissaries had stopped at the West Indies, Captain Marchand had written to me his intention to return to the United States. I would however remark that I had urged him to follow up a steamer called the Gladiator which had been fitted up and despatched from London with contraband of war for the insurgents. Though sailing under British colors, I advised him to seize her on the first symptom of destination to a harbor in the United States. His Lordship did not deny my right, but he intimated that the proof ought to be well established. I said that my government had no desire to open questions with this country. On the contrary I think they would do all in their power to avoid them. But I could not deny that these proceedings in England were excessively annoying, and that there would spring up a strong desire to arrest them as decisively as possible. His Lordship then passed to the case of Mr. Bunch, the consul at Charleston. . . . We then passed into more general conversation, in the course of which I ventured to ask if it was to be presumed that the two governments of France and Great Britain were acting in concert in regard to the United States. He said, Yes. I then mentioned my having received in my latest despatch notice that M. Mercier had apprised my government that the French stood in need of cotton. Was I to understand that this was in concert too? His Lordship said that he was aware of the French government having directed a suggestion to be made, that it would be glad to have cotton, but it was nothing more, and Lord Lyons had not any direction to join in it. I replied that I so understood it, but that I could not but regret such steps as they formed the only foundation upon which the insurgents rested their hopes of success. Mr. Yancey in his speech at the fishmongers' dinner had sufficiently expressed it, but in point of fact I had reason to know that he and his associates had been indefatigable in their representations of the certainty of interference in their behalf.

It was this view of the subject which created the irritation in the United States. If we could be left entirely to ourselves the issue would not be long doubtful. To this his Lordship made the common remark among his countrymen that we might perhaps coerce and subdue them, but that would not be restoring the Union. I answered that such was not our desire. What we expected to do was to give them an opportunity for making an unbiased decision. We believed that this was a conspiracy which had blown up a great rebellion. A short time would test the sense of the whole community. If the presence of a force adequate to protection did not develop a counter movement to return to the Union, I did not believe that pure coercion would be persevered in. I did not however add my conviction that slavery as a political element must be completely expunged before there can be any hope of permanent peace. I then took my leave and returned home." [1]

This record certainly shows Lord Palmerston in no attitude of hostility to America. On the contrary, he distinctly went out of his way to give a friendly intimation calculated to forestall and prevent the doing of something which was unfortunately already done, but which is now universally admitted to have been the super-zealous act of well-nigh incredible folly on the part of a highly indiscreet and ill-balanced naval officer. And Lord Palmerston did this, too, in a very kindly way. There was in his manner nothing either rough or brusque, or in any way offensive. On the contrary, it was marked by much characteristic *bonhomie*. Mr. Adams so accepted it, and began even to relax in his suspicions of the Premier.

The next glimpse we get of Palmerston he appears in quite another character. It is from the recently published Memoirs of Sir Horace Rumbold. The Trent was stopped November 8th; the interview between Mr. Adams and the Premier at Cambridge House was on the 12th; the news of what had taken place on the 8th reached London on the 27th. I now quote Sir Horace Rumbold: [2] "As soon as the news reached England, a Cabinet Council was summoned, and I had it on the same day from Evelyn Ashley that Lord Palmer-

[1] Mr. Adams's official account of this very significant interview is contained in a despatch to the Secretary of State dated November 15, 1861. It was never printed in the Diplomatic Correspondence, but is to be found almost in full in volume 115 of the War Records (pp. 1078, 1079).

[2] Sir Horace Rumbold, Recollections of a Diplomatist, vol. ii. p. 83.

ston, on entering the room where the Ministers met in Downing Street, threw his hat on the table, and at once commenced business by addressing his colleagues in the following words: 'I don't know whether you are going to stand this, but I 'll be d——d if I do!' The ultimatum demanding the surrender of the prisoners was decided upon there and then, and sent out within two days (on the following Sunday)."

Into what subsequently occurred in the so-called Trent affair I do not propose here to enter. It is matter of history, and, in this connection, I have no new light to throw upon it. The royal family was then at Windsor, having left Balmoral October 22. The Prince Consort began to sicken on the 1st of December; he died on December 14. As is well known, his very last public act was to soften down the asperities of the despatch to Lord Lyons as originally drawn up by the Foreign Secretary, and, according to usage, submitted to the Queen before transmission. Full details on this subject may be found in Sir Theodore Martin's Life of the Prince Consort. It is sufficient here to say — but to emphasize it is of importance in the matter under discussion — the last working hours of the Prince were anxiously devoted to an effort to preserve friendly relations between Great Britain and the United States. That might well have been considered his dying injunction to the Queen. The Prince was buried on the 23d of December; and when, on the 9th of the following month, Lord Palmerston officially communicated to her Majesty the intelligence that the Trent affair was happily solved, she promptly reminded him of the fact that "this peaceful issue of the American quarrel was greatly owing to her beloved Prince."[1]

In America active military operations had then ceased, and the two rivals were preparing for a supreme trial of strength when the season for military operations should open. Europe was looking on; a universal mourning for the Prince Consort overshadowed Great Britain; the stoppage of cotton shipments by the Federal blockade was beginning to make itself felt in the manufacturing districts of both England and France; the combined French, Spanish, and English movement on Mexico was in preparation; the expediency and consequent probability of a joint movement of European powers looking to a

[1] Lee's Victoria, p. 328.

recognition of the Confederacy and a consequent intervention in our Civil War was under discussion; no active movement to that end had, however, yet been initiated. The Queen herself, much broken by the death of her husband, and both mentally and physically in a condition which caused profound solicitude, attended to her public duties and transacted business as had been her habit with her ministers, but naturally had to be treated by them with great consideration. Morbid excitement was feared, and anything which might conduce to it carefully avoided.

This condition of affairs lasted all through both the winter and spring of 1862, — the months immediately following the death of the Prince Consort. During that time there is no reason whatever to suppose that, as a question of policy, any issue growing out of the American difficulties was brought to the Queen's notice. She had no occasion to express herself; and, weighed down by domestic affliction, her mind was intent on other things. During those months, however, the cotton famine reached its worst stages both in Great Britain and France; and, contemporaneously, the Union operations underwent severe reverses. As a natural result, the question of recognition, and consequent intervention, became urgent. The French Emperor publicly favored this course, repeatedly and persistently urging the British government to take the initiative, and signifying his readiness to co-operate.[1] The struggle in America was the uppermost subject of interest throughout Europe, and especially in Great Britain, where the tide of sympathy ran strongly with the Confederates in what was looked upon as their gallant struggle for independence against overwhelming odds of men and resources. The condition of the Queen, though not discussed openly, was well understood in court circles. She was unequal to any nervous strain. This was recognized by the Confederate emissaries in London as a serious obstacle in the way of that recognition for which they were praying. They also were well informed on this point; probably far better informed than the American Minister, for at least four out of five of the ministry and members of Parliament, and almost the entire court circle, were strong sympathizers with the Confederacy. Accordingly, on February 28, 1862, James M. Mason, the Confederate commissioner in

[1] Rhodes's United States, vol. iv. pp. 94 n., 346.

London, wrote to Mr. Hunter, the Richmond Secretary of State: "In political circles it is thought the condition of the Queen has much to do with the manifest reluctance of the Ministry to run any risk of war by interference with the blockade. It is said that she is under great constitutional depression, and nervously sensitive to anything that looks like war. Indeed much fear is entertained as to the condition of her health." And a few days later (March 11) to the same effect: "Many causes concur [in bringing about a general support of the ministry in its policy of non-intervention]. First, the prevailing disinclination in any way to disturb the mourning of the Queen. The loyalty of the English people to their present Sovereign is strongly mixed up with an affectionate devotion to her person. You find this feeling prevalent in all circles and classes." Finally, writing on the 31st of July following, Mason says: "The Queen remains in great seclusion, and it is more than whispered that apprehension is entertained lest she lapse into insania." [1]

That summer the Queen passed at Osborne, at Balmoral, and at Windsor; but early in the autumn (September) she went over to Germany, and was for a short time at Gotha, returning to England October 26. Earl Russell was in attendance there upon her; and the crisis in American affairs, so far as European intervention was concerned, then occurred. It was, I am inclined to believe, at that juncture, if ever, the Queen took a decided stand with the ministry against the adoption of any policy likely to lead to hostilities with the United States. Almost certainly the issue must then have been presented to her.

It came about in this wise: — Referring to the outcome of the so-called Pope, or second Bull Run, campaign before Washington in August, 1862, Lord Palmerston wrote to Earl Russell, then (September 14) in attendance at Gotha, suggesting whether the time had not come "for us to consider whether, in such a state of things, England and France might not address the contending parties and recommend an arrangement upon the basis of separation." This suggestion strongly commended itself to the Foreign Secretary, who replied on the 17th that he was decidedly of the same mind as the Premier: "I agree

[1] The Public Life and Diplomatic Correspondence of James M. Mason, pp. 264, 265, 315.

with you that the time is come for offering mediation to the United States government, with a view to the recognition of the independence of the Confederates. I agree further that, in case of failure, we ought ourselves to recognize the Southern States as an independent State. For the purpose of taking so important a step, I think we must have a meeting of the Cabinet. The 23d or 30th would suit me for the meeting." To this very emphatic acquiescence in his views, Lord Palmerston six days later, on the 23d, wrote back: "Your plan of proceedings . . . seems to be excellent. . . . As to the time of making the offer [of mediation] if France and Russia agree — and France, we know, is quite ready, and only waiting for our concurrence — events may be taking place which might render it desirable that the offer should be made before the middle of October." Lord Russell now left Gotha and returned to London, Lord Granville relieving him in attendance on the Queen. Shortly after Lord Granville assumed his personal duties a message reached him from the Foreign Secretary announcing the probability of the question of joint mediation being brought before the Cabinet. And it is just here if anywhere, — at the very darkest period of our struggle, that week in September which saw the indecisive conflict at Antietam in Maryland, and while the "fate of Kentucky was hanging in the balance," [1] — it was, as I surmise, at this juncture, if at all, that the Queen took the stand she is alleged to have taken, and put her personal veto on any movement, or change of policy, calculated to embroil the two countries. That she did so cannot be positively asserted from any evidence yet come to light. There is, however, a mystery which then did hang over the outcome of events, — a mystery the American Minister was unable to penetrate, and never did penetrate, — but which would be explained in a way altogether natural on the hypothesis that the incident narrated by Prince Leopold occurred at that time. In any event, something indisputably did occur of a nature potent enough to give pause to the programme fully decided upon between the two heads of the Cabinet.

The letter from Lord Russell in London to Lord Granville in attendance at Gotha, announcing the proposed change of policy, and intended, of course, for the information of the

[1] Rhodes's United States, vol. iv. p. 177.

Queen, must have reached its destination during the last ten days of September. Now it is a well-established fact historically that, under the guidance of the Prince Consort, the Queen had ever since the early days of her reign come to "regard the supervision of foreign affairs as peculiarly within the Sovereign's province."[1] After the Prince Consort's death, — "gradually she controlled her anguish, and deliberately resigned herself to her fate. . . . Hitherto the Prince, she said, had thought for her. Now she would think for herself. His example was to be her guide. The minute care that he had bestowed with her on affairs of State she would bestow. Her decisions would be those that she believed he would have taken. She would seek every advantage that she could derive from the memory of his counsel."[2] As respects the struggle in America, the chief members of the ministry had "made no secret of their faith in the justice of the cause of the South. The Queen and Prince Consort inclined to the opposite side."[3] During the year following the Prince's death she on more than one occasion "pressed her own counsel on [her Ministers] with unfailing pertinacity, and was often heard with ill-concealed impatience." Once at least it is recorded that in a matter of continental policy she "sternly warned her Government against any manner of interference"; and on another occasion she wrote, — "I know that our dear angel Albert always regarded a strong Prussia as a necessity, for which therefore it is a sacred duty for me to work." To the same effect in January, 1864, she wrote to Duke Ernst, the brother of the Prince Consort, referring to a matter of foreign policy, — "Our beloved Albert *could not* have acted otherwise." Subsequently, during the Schleswig-Holstein complications, when the ministry, backed by public sympathy, strongly inclined to intervention, "the credit of upholding in England a neutral policy was laid with justice, in diplomatic circles, at the Queen's door."[4] As Mr. Gladstone at this time wrote of her from Balmoral to his wife, "her recollection of the Prince's sentiments [is] a barometer to govern her sympathies and affections."[5]

[1] Sidney Lee's Queen Victoria, p. 128.
[2] *Ibid.*, p. 323.
[3] *Ibid.*, p. 314.
[4] *Ibid.*, pp. 336, 337, 338, 345, 351.
[5] Morley's Gladstone, vol. ii. p. 97; also, *ibid.* p. 102.

Such was the practice during the period succeeding the death of Prince Albert, and such the course of the Queen. The communication from Earl Russell to Lord Granville, involving as it did a question of state policy of great moment on an issue which absorbed public attention, must presumably have been brought to the notice of the Queen. It was for that purpose Earl Granville was in attendance; and Earl Granville, besides being an experienced diplomat, was a most tactful man.[1] If it was so brought to the Queen's notice, what then passed between her and the member of the Cabinet in attendance upon her, we do not know. We do know that the Queen felt a chronic mistrust of Lord Russell's judgment in the conduct of foreign affairs, a mistrust which had been made manifest to her other advisers; as Mr. Gladstone expressed it a year later, "I have already had clear proof of this."[2] Whatever may have occurred on the present occasion, we further know that Lord Granville at once wrote "a very long letter" to the Foreign Secretary, one passage from which only has come to light. It is quoted in Spencer Walpole's Life of Earl Russell. That passage is significant. It was very much in the nature of a cold douche to the action proposed: "It is premature to depart from the policy which has hitherto been adopted by you and Lord Palmerston; and which, notwithstanding the strong antipathy to the North, the strong sympathy with the South, and the passionate wish to have cotton, has met with such general approval from Parliament, the press, and the public."[3]

It would be very interesting in the present connection if we could see the rest of the "long letter" from which such a paltry extract was thus taken. Though Lord Granville was naturally much deferred to in the council of a ministry over which it had originally been proposed he should himself preside as Premier, it is to be presumed that the Foreign Secretary,

[1] "Lord Granville was excessively fortunate in all his dealings with the Queen. A finished actor and a finished man of the world, he contrived in all conditions to maintain exactly the right tone. The remarkable gifts of this astute statesman never appeared to such brilliant advantage as during his interviews with the Queen, whom he exhilarated with his gaiety and sprightly wit. Of Lord John Russell she said amusingly, that he would be better company if he had a third subject; for he was interested in nothing except the Constitution of 1688 and — himself." Quarterly Review, January, 1901, p. 333.

[2] Morley's Gladstone, vol. ii. p. 98.

[3] The Life of Lord John Russell, vol. ii. p. 363.

in Downing Street, wrote to the Lord President of the Council, at Gotha, not to obtain an expression of his own views, but as the member of the Cabinet then in immediate attendance on the Queen. Rumors, strange and painful, were in circulation concerning her condition. One, well understood at the time, was that she believed herself to be in constant spiritual communication with her dead husband. This had become an hallucination, and odd stories, half humorous and wholly pathetic, were whispered about of the extravagances into which she was led by it. Lord Granville was a discreet as well as a considerate man; very devoted to the Queen, he was the last person likely to put anything on paper which might reflect on the Queen's sanity, or imply a doubt concerning it. None the less she had to be dealt with most tenderly. She was, moreover, especially sensitive about the attitude of Great Britain towards America. She may well have looked upon that question in the light of what she regarded the dying injunction of her husband — not yet nine months gone.[1] War she shrank from always, and she regarded Prince Albert as a victim in the cause of amity in this particular case. Under all these circumstances — the native obstinacy of her disposition not improbably incited to action by some implicitly believed supernatural communication — it is more than possible, it is highly probable even, that she now expressed herself to Lord Granville in some such way as that traditionally reported in the Prince Leopold anecdote. Nothing indeed would have been more natural than for her so to do. She was immovable; and that immobility the tactful Granville expressed in the somewhat noticeable diplomatic phraseology of the above brief extract from his "very long letter." If so, his colleagues evidently understood him.

Certainly, what then ensued is curious. A programme of momentous foreign policy advisedly entered upon after months of consideration by men of mature life and long experience, like Palmerston and Russell, was not lightly to be abandoned. It might be deferred. They understood the Queen; they

[1] Referring to the Schleswig-Holstein question a year later, and describing an evening's talk with the Queen, Mr. Gladstone wrote: "She spoke about this with intense earnestness, and said she considered it a legacy from him." And again, in September, 1864: "Whenever she quotes an opinion of the Prince, she looks upon the question as completely shut up by it, for herself and all the world." Morley's Gladstone, vol. ii. pp. 102, 105.

fully appreciated the condition in which she then was, as well as that into which she might easily be precipitated. They might well, by inconsiderate action on that particular subject, force her over the edge of the much dreaded abyss. Studied from this point of view, what now ensued was suggestive. The Cabinet fell into a species of chaos. It was small matter for surprise that Mr. Adams, watching intently outer developments, professed himself unable to grasp the bearing of what was said and done. If I am correct in my present surmise, he did not hold the key to the mystery.

Immediately on receiving Lord Granville's "very long letter" from Gotha, Lord Russell transmitted it to Lord Palmerston, then at Broadlands. This was probably about the 30th of September. Two days later, on October 2, it was returned to the Foreign Secretary with a hesitating reference to the course of events in America as indicated by the tidings which immediately followed the outcome at Antietam, closing with a suggestion of delay. "Ten days or a fortnight more may throw a clearer light upon future prospects." That "ten days or a fortnight" Lord Russell utilized in the preparation of an elaborate, though confidential, cabinet circular in direct furtherance of the deferred mediation programme. In spite of the significant missive from Gotha, that programme was by no means abandoned; and most naturally not. It had been discussed, and agreed upon. In the Cabinet circular the question was plainly put, whether in the light of what had taken place in America, and the condition of distress prevailing throughout the manufacturing districts of England and France, it was not the duty of Europe "to ask both parties, in the most friendly and conciliatory terms, to agree to a suspension of arms for the purpose of weighing calmly the advantages of peace," — and so forth and so on, in the usual cant of the philanthropic, but interested, neutral. This confidential memorandum was sent forth on or about the 13th of October. The meeting of the Cabinet was fixed for the 23d. The crisis for America was plainly imminent. Mr. Adams was much alive to it, but very conscious of his own impotence to affect results. "The suspense," he wrote, "is becoming more and more painful. I do not think since the beginning of the war I have felt so profoundly anxious for the safety of the country." And again, a few days later, — "We are

still left in suspense. I hope more than I dare express. For a fortnight my mind has been running so strongly on all this night and day that it seems almost to threaten my life."

Just then it was that Mr. Gladstone further complicated the situation by that famous Newcastle speech in which, amid the cheers of his audience, he declared that Jefferson Davis had "made a nation" and went on to express his belief that the independence of the Confederacy and the consequent dissolution of the American Union were "as certain as any event yet future and contingent can be." A more indiscreet utterance on the part of a prominent public man it would be difficult to formulate. Twenty-one years later, when himself Prime Minister, Mr. Gladstone had occasion to refer to a not dissimilar speech made by a colleague on a matter of policy then under discussion, and he did so in words at once characteristic and curiously applicable to his own Newcastle outbreak when Chancellor of the Exchequer in the Palmerston-Russell ministry. The colleague in question, he wrote, "seems to claim an unlimited liberty of speech," and what he said, he went on to add, "exceeded [the recognized limits of modesty and reserve] largely, gratuitously, and with a total absence of recognition of the fact that he was not an individual, but a member of a body."[1]

Well might Mr. Adams write in his diary, after reading the apparently wanton, unless deeply significant, utterance of Mr. Gladstone, — "If he [the Chancellor of the Exchequer] be any exponent at all of the views of the Cabinet, then is my term likely to be very short; for the animus as respects Mr. Davis and the recognition of the rebel cause is very apparent. . . . The meditation on these things sensibly depressed my spirits. We are now passing through the very crisis of our fate." And he had good cause so to express himself. The European cotton famine of 1861–1863, incident to the Union blockade of the ports of the Confederacy, and the suffering, not less wide-spread than cruel, thereby occasioned, have long since passed out of recollection. It is as if they, together with the political pressure and international problems resulting therefrom, had never been. None the less, a few weeks only after Lord Russell drafted his Cabinet circular just referred to, Mr. Gladstone expressed himself in language

[1] Morley's Gladstone, vol. iii. p. 113.

most emphatic as to "the heavy responsibility you [Americans of the North] incur in persevering with this destructive and hopeless war at the cost of such dangers and evils to yourselves, to say nothing of your adversaries, or of an amount of misery inflicted upon Europe such as no other civil war in the history of man has ever brought upon those beyond its immediate range." The writer then went on thus to set forth the wickedness of any further continuance of our efforts towards a re-establishment of the Union: "The impossibility of success in a war of conquest of itself suffices to make it unjust. When that impossibility is reasonably proved, all the horror, all the bloodshed, all the evil passions, all the dangers to liberty and order, with which such a war abounds, come to lie at the door of the party which refuses to hold its hand and let its neighbor be. You know that in the opinion of Europe that impossibility has [in the present case] been proved."[1]

Returning to Mr. Gladstone's speech at Newcastle-on-Tyne, that extraordinary and well-nigh inexplicable indiscretion has been sufficiently discussed elsewhere. Mr. Morley also has a good deal to say about it in his recent book.[2] It is here referred to only in its connection with the Palmerston-Russell programme of September–October, 1862, involving a recognition of the Confederacy and the cessation of hostilities. Of that proposed action the Chancellor of the Exchequer was advised. He had been consulted concerning it,[3] and in his Newcastle speech he merely foreshadowed a coming event. It was so understood by the public; and, being so understood, the Chancellor of the Exchequer had, so to speak, unwittingly let the cat out of the ministerial bag. The Newcastle speech was on the 7th of October; on the 13th the Foreign Secretary sent out his confidential memorandum to the members of the Cabinet; on the 23d the meeting of the Cabinet was to take place. That meeting never

[1] Letter to Cyrus W. Field, November 27, 1862. Harper's Monthly Magazine, (May, 1896), vol. xcii. p. 847.

[2] Mr. Gladstone himself long subsequently (1896) said of this utterance: "My offence was indeed only a mistake, but one of incredible grossness, and with such consequences of offence and alarm attached to it, that my failing to perceive them justly exposed me to very severe blame." Morley's Gladstone, vol. ii. p. 82.

[3] *Ibid.* p. 76.

did take place. On the 14th Sir George Lewis, head of the War Office, speaking at Hereford, very pointedly controverted the position taken by his colleague, the Chancellor of the Exchequer; and thus, as if by magic, the Premier and the Foreign Secretary found themselves between two fires, Lord Granville, representing the Queen on one side, and Sir George Lewis, speaking for what might be best described as the Cobden-Bright element in the Cabinet, on the other side.[1] That cross-fire drawn by Mr. Gladstone so inopportunely for them, so opportunely for us, Lord Palmerston did not care to face. And in such emergencies it was now the wont of the octogenarian Premier to suggest that "it would be best for us to wait awhile before taking any strong step." So they waited now; but the time for taking the "strong step" in this case never came.

To what extent the well-known physical and mental condition of the Queen, her attitude towards the United States, and her utterances to her Ministers may have contributed at this most important juncture to the negation of action will, in all human probability, remain a mystery. That they were important factors in the final result may perhaps be assumed from the extract I have quoted from Lord Granville's letter to Earl Russell. That her attitude and utterances assumed at any time the emphatic and obstructive shape assigned to them in the royal family traditions cannot be asserted; to me it seems probable they did. In any event, Prince Leopold's story furnishes a most plausible explanation of a diplomatic and political *volte-face* in a move which at the time Mr. Adams correctly regarded as involving the "very crisis of our fate," and the outcome of which he afterwards always looked back upon as strangely inexplicable.

The meeting of the British Cabinet, notified for October 23, 1862, was, as I have said, never held. In part place of it, the American Minister on the afternoon of that day had a long and very significant talk with the Foreign Secretary at his official residence in Downing Street. Of that interview, and what then was said, Mr. Adams at the time wrote down

[1] Mr. Morley, however, in his Gladstone (vol. ii. p. 80) says, — "Lewis, at Lord Palmerston's request as I have heard, put things right." This would not affect the statement in the text as to a strong difference of opinion in the Cabinet over the question at issue. See Life of C. F. Adams, American Statesmen Series, pp. 283–289.

two accounts, — one in his diary, the other in the form of a despatch to Secretary Seward. In neither account is there any reference to the Queen, or suggestion that by possibility she had exercised an influence over the outcome of events. That the danger had been great and the margin of safety the narrowest possible, Mr. Adams fully realized; but I gravely doubt if it ever entered into his conception that, at the very most critical period of our foreign relations during the Civil War, — a period when it was simply touch-and-go with the Union, — the whole course of events may not impossibly have turned on the individual attitude of the widow of Prince Albert.

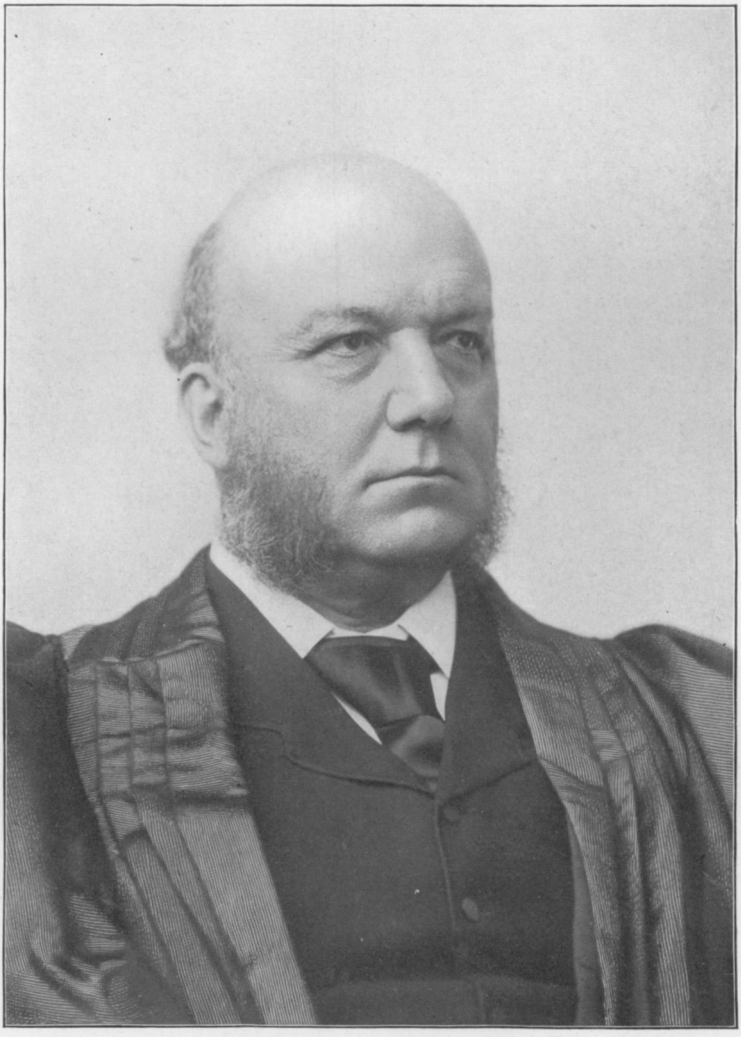
Mr. Adams's diary account of his interview with Earl Russell on the afternoon of October 23, 1862, is as follows: [1] —

"At half-past two o'clock drove to the Foreign Office to keep the appointment made by Lord Russell for three. I found in the antechamber quite a number of the corps, however, apparently assigned for the same hour. Among them Count Bernstorff, who has just returned, Baron Brunnow, Count Flahault, M. Musurius and the Spanish and Danish ministers at a later moment. Of course there was a long delay and desultory conversation. The only thing worth noting was that Baron Brunnow, on coming down from his interview, took me aside and reminded me of a conversation we had had some time ago in the same chamber, in which he had expressed a belief of the intention of this government to maintain its position with us. He remembered I had expressed doubts, but he had proved right. He still thought that the same disposition continued to prevail. I said I was glad to hear him say so. As to the past I could only say that I then thought I had reason for my doubts. Some time or other I would tell him, but at present I could not. He said he remembered I had said so before and he had made a note of it. It was half past four before I had my audience. I began by referring to the topic which had last occupied us at the preceding meeting in August, the objection of Lord Palmerston to a report of certain language of his at our conference last year attributed to me by one of the commanders of our national vessels whom I had never seen or heard of. I read to him a part of a Despatch of Mr. Seward on the subject completely exonerating me from all share in the business, and promising to search out the source of the fable. Lord Russell said this was quite enough to dispense with the necessity of saying anything to Lord Lyons about it. I then seized this allusion to

[1] The formal despatch containing his report of this interview is printed in Diplomatic Correspondence, 1862, p. 223. Adams to Seward, October 24, 1862.

Lord Lyons to introduce my real object in the interview. I expressed the hope that he might be going out for a long stay. I had indeed been made of late quite fearful that it would be otherwise. If I had entirely trusted to the construction given by the public to a late speech I should have begun to think of packing my carpet bag and trunks. His Lordship at once embraced the allusion, and whilst endeavoring to excuse Mr. Gladstone, in fact admitted that his act had been regretted by Lord Palmerston and the other Cabinet officers. Still he could not disavow the sentiments of Mr. Gladstone so far as he understood them, which was not that ascribed to him by the public. Mr. G. was himself willing to disclaim that. He had written to that effect to Lord Palmerston. I replied that I had no intention to ask a disavowal, nor did I seek even to impute to Mr. Gladstone the construction of his language adopted by others. At the same time I saw its mischievous effects in aggravating the evil of the growing alienation of the two countries. Mr. Gladstone's speech would be published everywhere in America. It would therefore be regarded as an official exposition, and as such would aggravate the irritation already much too great. On the other hand, it formed a nucleus here around which all those adverse to peace with us would concentrate. Lord Lyons had called on me in the morning and we had joined in regretting the change going on here for the worse. Much as I had been disposed to friendly relations I was beginning to despair. His Lordship admitted the change in a degree, but he thought there was still a majority in any ordinary meeting well inclined. I said that it might be so now, but two more speeches like that of Mr. Gladstone would dissipate it all. His Lordship said that the policy of the government was to adhere to a strict neutrality, and to leave this struggle to settle itself. But he could not tell what a month would bring forth. I asked him if I was to understand that policy as not now to be changed. He said Yes. I answered that my errand was then finished. And I took my leave."

Remarks were made during the meeting by Messrs. CHARLES E. NORTON, WILLIAM R. THAYER, FRANKLIN B. SANBORN, and ARCHIBALD CARY COOLIDGE.



Horace Gray

# MEMOIR

OF

# HORACE GRAY, LL.D.

BY GEORGE F. HOAR.

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It is the rare good fortune of the Historical Society to count among its members many famous judges. John Lowell, John Davis, Lemuel Shaw, George T. Bigelow, Theron Metcalf, Benjamin R. Curtis, Benjamin F. Thomas, E. Rockwood Hoar, Charles Devens, Walbridge A. Field, and Horace Gray make a list of men whose biography would be almost a thorough history of American jurisprudence since the adoption of the Constitution. Each of the men whom I have named well served the State in more than one department of usefulness, and would have been an eminent man, the particulars of whose life would have been worth recording, if he had never been upon the bench.

This is not mere accident. It is not, I think, because these men have been eminent citizens of Massachusetts, and the Society has always liked to reckon among its members eminent citizens of Massachusetts. It is largely because a great American judge must be penetrated with the spirit of American history. The capacity needed for a judge is the same with that needed for a historian. Each must be able to weigh evidence in an intellectual balance in which there is no dust and no local attraction. Each must have that rare but indispensable gift of discerning the truth of the fact in spite of the weight of the evidence. Each must be able to understand human nature and be able to attribute the true and rightful motive to human action. The historian must thoroughly understand the laws of the people whose chronicles he is to write, or he never can comprehend their history. The judge must thoroughly understand the history of the people whose justice he is to administer, or he never can comprehend

their laws. Each must be able, to use Emerson's phrase, to "scan truth and conduct with a cold eye," and each must be penetrated with an enthusiastic love of the country whose story he is to tell or whose law he is to declare.

Of course the gift of spirited and telling narrative, rising on fit occasion to the loftiest eloquence, must belong to the perfect historian. It is rarely, if ever, that the use of such a faculty would be becoming to a judge. His impression, if he have to state facts or to argue great principles, must be made by the clearness of his statement and the weight of what he says. In that respect the capacity of the historian is that of the advocate and not of the judge. Yet sometimes the style of the greatest historians has been eminently judicial, and, on some rare occasions, judges have risen to the highest eloquence in their judicial opinions.

Horace Gray was called to the bench too early in his career to have won much fame in any other field. Yet he had already abundantly proved his capacity as an advocate, as a historical investigator, as a scholar, and as a student of natural history. He did just enough in each of these fields to make his friends certain that he would have acquired fame there if he had not been devoted from his youth to the public duty to which he gave himself up with a singleness of purpose rare even among great judges.

The reader who does not belong to the profession of the law is not likely to take interest in a list of judicial decisions, however important the questions, or in a summing up of the arguments, however powerful, by which they were supported. Yet that is all that commonly makes up the biography of a judge, unless he was something else than a judge. So, what is wanted in the case of Chief Justice Gray, and the same was eminently true of Chief Justice Shaw, is not so much a biography as a portrait, — such a portrait, if any one living could be found to achieve it, as that contributed to our proceedings by our lamented associate Judge Thomas, of his friend and associate Lemuel Shaw, — a sketch, in the judgment of the writer, not surpassed by anything of its kind in literature.

The intellectual and moral qualities and the tastes which made Judge Gray eminent among the lawyers of Massachusetts and of the country, from the time of his admission to the bar until his death, came to him by lawful inheritance.

Horace Gray was born in Boston, March 24, 1828. He was the son of Horace Gray and Harriet Upham, daughter of Jabez Upham, of Brookfield, Massachusetts, and the grandson of William Gray and his wife Elizabeth Chipman.

Elizabeth Chipman was the daughter of John Chipman who was graduated at Harvard in 1738. He was a barrister in Essex County and died in Portland, then Falmouth, while arguing a case, in 1768.

Elizabeth Chipman's brother was Ward Chipman, Judge of the Supreme Court of New Brunswick, who was graduated at Harvard in 1770 and died in 1824. The son of Ward Chipman was graduated at Harvard in 1805, got his degree of LL.D. in 1836, and was Judge and Chief Justice of the Supreme Court of New Brunswick. He died in 1851 without issue.

William Gray was a very important figure in New England in the days just preceding and just following the War of 1812. He was the largest ship-owner in the country, and nearly or quite the foremost and most successful merchant in New England. He was Lieutenant-Governor of Massachusetts. He was a man apt to succeed in any undertaking in which he was engaged. Many anecdotes are still current of his wise and racy sayings. He acquired a great fortune, which he left to his children.

His sons were, all of them, men of mark and influence in Boston.

Horace Gray's father, Horace Gray the elder, was extensively engaged in business as a manufacturer. One of his uncles, Francis C. Gray, whose tastes and capacity for historical and legal research resembled his own, led a life of studious leisure. He had a high reputation as an accomplished scholar. To him was owing the discovery of the precious Body of Liberties of Massachusetts, enacted in 1641. It had long disappeared from the knowledge of men, until by a fortunate accident Mr. Gray discovered the old manuscript, which his historic knowledge enabled him to identify. This code — which has been practically in force in Massachusetts from the time of its enactment until to-day — was not printed, but was sent about among the towns of Massachusetts in manuscript, that it might escape the knowledge of the Royal Councillors in England and so not be disapproved by the Crown.

On the mother's side Judge Gray was the grandson of

Jabez Upham, one of the great lawyers of his day, who died in 1811, at the age of forty-six, after a brief service in the National House of Representatives. He was settled in Brookfield, Worcester County. The traditions of his great ability were fresh when I went there to live, nearly forty years after his death. The memory of the beauty and sweetness and delightful accomplishment of Mr. Upham's daughter, Judge Gray's mother, who died in the Judge's early youth, was still fragrant among the old men and women who had been her companions. She is mentioned repeatedly in the letters of that accomplished Scotch lady — friend of Walter Scott and of so many of the English and Scotch men of letters in her time — Mrs. Grant of Laggan. Mrs. Grant says in a letter published in her Memoir: "My failing memory represents my short intercourse with Mrs. Gray as if some bright vision from a better world had come and, vanishing, left a trail behind." In another letter she speaks of the enchantment of Mrs. Gray's character: "Anything so pure, so bright, so heavenly, I have rarely met with."

Judge Gray married, June 4, 1889, Jane Matthews, daughter of the late Stanley Matthews, Associate Justice of the Supreme Court of the United States.

Horace Gray was graduated from Harvard College in 1845; from the Harvard Law School in 1849; studied law with Sohier & Welch; was admitted to the bar in 1851; performed the duties of Reporter of the Supreme Court of Massachusetts in behalf of Luther S. Cushing for a year or two during Mr. Cushing's illness; was appointed Reporter to succeed Mr. Cushing in 1854; held that office until 1861; practised law in partnership with Ebenezer Rockwood Hoar and Edward Bangs from 1857 to 1859, when that partnership was dissolved by Mr. Hoar's appointment to the Supreme Court; continued in practice at the Suffolk bar until August, 1864; was appointed Associate Justice of the Supreme Judicial Court of Massachusetts, August 23, 1864; Chief Justice of that Court, September 5, 1873; commissioned an Associate Justice of the Supreme Court of the United States, December 20, 1881. His oath of office as Associate Justice of the Supreme Court of the United States, by the operation of the Constitution of Massachusetts, vacated his office of Chief Justice, January 9, 1882.

He was in his seat in the Supreme Court of the United States for the last time Monday, February 3, 1902. On the evening of that day he had a slight paralytic shock, which seriously affected his physical strength. He retained his mental strength and activity unimpaired until just before his death. On the 9th day of July, 1902, he sent his resignation to the President, to take effect on the appointment and qualification of his successor. So he died in office, September 15, 1902.

He became a member of the Massachusetts Historical Society, April 11, 1858, and of the American Antiquarian Society, October 22, 1860. He was a candidate in the Massachusetts State Convention of 1860 for the Republican nomination for Attorney-General, in competition with Charles Devens and Dwight Foster. Mr. Foster was the successful competitor.

Judge Gray's professional and judicial life came at the time of a radical change in the education of lawyers, as well as in the method of administering justice and the style and fashion of judicial opinions. The old lawyer and the old judge began his education by obtaining, as far as might be, a mastery of legal principles. In general his first inquiry was, if any legal problem were presented to him, if it were a question of common law, "What is the just general rule?" If it were the question of the construction of a statute, "What construction of the statute will make of it a just general rule?" In applying the common law to any state of facts he took it for granted that the common law was the perfection of reason, and that it contained what the experience of ages had found to be the most just and convenient rules of conduct for mankind in dealing with each other in matters concerning property, or reputation, or liberty, or life. When the student, or the counsellor at law, or the judge had made up his mind on that, he then considered the adjudged cases with the view of fortifying his own opinion by their authority. If he found them in conflict with that opinion, before yielding to them, he did his best to reconcile them with his idea of justice, to limit and restrict them as far as possible and, unless the current of authority were too strong, to get them overruled if they were wrong. The study of law was a study of ethics or moral philosophy.

The Law School in Judge Gray's youth had, under Ashmun and Story and Greenleaf and Parker, been brought to a high standard of excellence. But still the chief law school was the court-house, and the best place to study was the office of a great practising lawyer. The art of conducting a trial, of convincing courts or juries, of putting in a case, the difficult art of cross-examination, the more difficult art of refraining from cross-examination were learned by great examples. It was always a good excuse for a young lawyer's absence from his office if there were a notice on his door, "At the Court House."

The old teachers in the Law School taught their pupils according to the old system. It was indeed an admirable place for study. The youth sat at the feet of great men who had been great judges and great advocates and who had won great forensic successes. Story and Parker and Greenleaf fought over again the battles of the court-house and told the story of great victories which they had witnessed and which they had shared. The young men argued cases in the law clubs and in the Moot Court, over which these great judges presided. They breathed nothing but a legal atmosphere. They discussed legal questions at the table, at their boarding-house, in their long walks, and in visiting each other's rooms, where they sat up together sometimes until the constellations set, with the time-consuming habits of youth. In all this education the reasoning power was concerned with, and developed by, the consideration of general principles, and the adjudged cases played a comparatively small and secondary part.

All this is changed now. I do not undertake here to deny that the change has not been necessary or that it has not been a change for the better. With the change Judge Gray, though never, I believe, a teacher of law, had much to do. Although he was brought up and educated under the old system, he is one of the very best examples of the new system.

Mr. Gray never held a political office and, so far as I know, never took an active part in any political campaign. But he was profoundly interested in the great public questions with which the American people had to deal in his lifetime. There were among his near kindred, in his youth, men of great ability and high character, very influential and eminent leaders

of the Whig Party. They were men especially likely to influence a youth just coming to manhood, especially if he were brought within the circle of their personal influence. The social life of Boston and the scholarship of Cambridge were on that side. Yet Gray was an original Free Soiler. He had a high personal regard for Mr. Winthrop, with whom he had a family connection. But he voted steadfastly for John G. Palfrey, whose candidacy was peculiarly repugnant to the Whigs, and to the high social circles in Boston and Cambridge, because he had refused, when a Whig Representative, to support Mr. Winthrop for Speaker. The fires of those old controversies are all extinguished now. But it required great independence and great courage for a young man like Gray, just coming into professional life in Boston, to take his part on that unpopular side. Gray never lost his interest in political affairs so long as he lived. Yet he carefully maintained the propriety and impartiality of his great judicial office. Nobody ever thought of him as a political judge. I suppose that if political or personal feeling or desire could have entered into such a question with him, it would have gratified him beyond measure if he could have found it in his power, as a judge, to have pronounced the action of the Government in regard to the Philippine Islands unlawful and unconstitutional.

Horace Gray was graduated from Harvard at the age of seventeen. When in college he was not specially eminent as a scholar, but very early developed a taste for natural history. He was an excellent botanist, and might fairly be called a learned ornithologist. He visited Europe several times in his youth. I suppose that with his father's large wealth, which was employed in manufacture, it was the son's expectation to lead a life of elegant leisure, without anxiety as to his own livelihood, and in the pursuit of a refined scholarship. But the large establishments in which Mr. Gray's property was embarked were overtaken by financial reverses; so his whole wealth, inherited and acquired by himself, was swept away.

The son got the news in Europe and hurried home to meet the new conditions in a brave and manly way. He exchanged his rare library of books on natural history for law books, and came out to Harvard and entered his name in the Harvard Law School. I can remember now his wistful face, full of curiosity and intelligence, as he appeared at the door

of my room early one morning to find out, if he could, what this, which was a new world to him, was all about. He threw himself into the study of the law with an untiring industry, begotten of deep enthusiasm. He soon took his place among the best scholars of the Law School, which was then full of the traditions of Story, who had just died, and of Greenleaf and Parker and the younger Parsons and Franklin Dexter, who were his instructors.

His memory had been trained by his study as a naturalist to remember names which had in general no scientific connection with the things they signified. From that, I suppose, came his wonderful capacity for remembering the names of cases, which used to seem in his younger days little less than miraculous.

Shortly after he was admitted to the bar, it happened that Mr. Luther S. Cushing, the reporter of the decisions of our Massachusetts Supreme Court, broke down in health. He employed Mr. Gray to go on the circuit with the Judges and report the decisions. So he, in fact, prepared the final volumes of Cushing's Reports. He had already acquired a great stock of learning for a man of his age. Even then his wonderful capacity for research, the instinct which, when some interesting question of law was up, would direct his thumb and finger to some obscure volume of English reports of law or equity, was almost like the scent of a wild animal or bird of prey. He got acquainted on the circuit with all the great Massachusetts lawyers of that day — Choate and Curtis and Bartlett and Charles Allen and Loring. I suppose no other bar in the country, except that of the Supreme Court of the United States, could show their equals, and they had no superiors even there. When any one of these men was arguing or was waiting to argue a great case, the young reporter would often appear to him with a case which the counsel had not discovered, and was pat to the question. So, although he was hardly out of his boyhood, they all got to like him as a companion and to respect him as a lawyer. When Cushing died most of these leaders joined in a recommendation of Gray, who was then but twenty-six years old.

That office in Massachusetts in those days was one of great honor and dignity. It would have been regarded as a promotion by any judge of any court but the highest. And the

man who held it ranked almost as an equal with the Judges of the Supreme Court. Four of our reporters have been appointed to that bench since I came to the bar.

The duties of his office did not leave Mr. Gray a great deal of time for the active general practice of his profession. But he was employed on some very important commercial cases. He made several constitutional arguments in leading cases, and his advice was much trusted by business men. When the war broke out in 1861, Governor Andrew depended very largely upon Gray for legal advice in the very difficult and perplexing questions with which he had to deal. He was full of resources, courageous, and his advice was always safe and sure.

Immediately upon his admission to the bar, Mr. Gray took a place in the very front rank of his profession in the Commonwealth of Massachusetts. He maintained it with a constantly increasing reputation until he was appointed to the bench. His name first appears as counsel before the full bench of the Supreme Court in Pond *v.* Williams, 1 Gray, 630, argued at Worcester, in the October term, 1854. His last appearance was in Wales *v.* China Insurance Company, 8 Allen, 380, argued in Suffolk in January, 1864. Including these two, he argued thirty-one cases before the full court.

These cases, with scarcely an exception, were cases of great importance by reason either of the amount involved or the character of the question. In nearly every one of them Mr. Gray was opposed by counsel of the very first rank, and in nearly every one of them he made the principal argument on his own side. In the first case in which he appeared he was, alone, opposed to Charles Allen, who, in the opinion of many persons, had no superior in his time in intellectual power. In the third of the cases he was opposed, alone, to Sidney Bartlett and C. B. Goodrich, and in the fourth and sixth to Rufus Choate. Among his antagonists in the thirty-one cases were Otis P. Lord, A. A. Ranney, Sidney Bartlett, B. R. Curtis, C. B. Goodrich, Benjamin F. Thomas, T. L. Nelson, A. H. Fiske, I. F. Redfield, John Lowell, Dwight Foster, and John H. Clifford. Any lawyer who will look at the names of the counsel employed in these cases will see that the young man must have been retained on the advice of experienced counsel who desired to get the best professional assistance to be had for their clients.

The questions raised in all of them were of interest and importance. Dearborn *v.* Ames involved the construction and constitutionality of the law transferring the jurisdiction previously invested in Commissioners of Insolvency who, under the Constitution, were required to be elected by the people at frequent periods, to Judges of Insolvency who, under the law creating that court, were to be appointed by the Governor and to hold office during good behavior. Whittenton Mills *v.* Upton, 10 Gray, 582, involved the question of the right of a corporation, established under the laws of Massachusetts, to form a partnership with an individual.

Among the best examples of Mr. Gray's thorough historical and legal research are the notes and appendix to the celebrated case of the Writs of Assistance relating to slavery in Massachusetts and the New England States, prepared by him in 1864 for Quincy's Reports, and the notes to the case of Commonwealth *v.* Roxbury, 9 Gray, 451, written in 1857. This latter exhausts the learning as to the title in this Commonwealth to flats bounding on the shore of the Commonwealth and great ponds, the interest of the Commonwealth and the easement of the public therein.

So it was natural when there came a vacancy on the Supreme Bench in 1864 to offer it to him. He was, I think, the youngest judge who had ever been appointed to that court. He maintained fully and without any diminution the great traditions which had come down from Parsons and Shaw and Bigelow, and their companions, — traditions which are as precious to the people of the Commonwealth and of which they are as proud as they are of their Puritan or Pilgrim or Revolutionary history.

The title which the kindness of our countrymen has given to Massachusetts, that of Model Commonwealth, I think has been earned largely by the character of her judiciary, and never could have been acquired without it. Among the great figures that have adorned that bench in the past, the figure of Judge Gray is among the most conspicuous and stately.

Judge Gray had from the beginning a reputation for wonderful research. Nothing ever seemed to escape his industry and profound learning. This was shown on a few occasions when he undertook some purely historical investigation, as in his notes on the case of the Writs of Assistance,

argued by James Otis and reported in Quincy's Reports, and his recent admirable address at Richmond, on Chief Justice Marshall. But while all his opinions are full of precedent and contain all the learning of the case, he was, I think, equally remarkable for the wisdom, good sense, and strength of his judgments. I do not think of any judge of his time anywhere, either here or in England, to whom the profession would ascribe a higher place if he be judged only by the correctness of his opinions in cases where there were no precedents on which to lean and for the excellent original reasons which he had to give. I think Judge Gray's fame, on the whole, would have been greater as a man of original power if he had resisted sometimes the temptation to marshal an array of cases, and had suffered his judgments to stand on his statement of legal principles without the authorities. He manifested another remarkable quality when he was on the bench of Massachusetts. He was an admirable Nisi Prius judge. I think we rarely have ever had a better. He possessed that faculty which made the jury, in the old days, so admirable a mechanism for performing their part in the administration of justice. He had the rare gift, especially rare in men whose training has been chiefly upon the bench, of discerning the truth of the fact in spite of the apparent weight of the evidence. The Supreme Court, in his time, had exclusive jurisdiction of divorces and other matters affecting the marital relations. The judge had to hear and deal with transactions of humble life and of country life. It was surprising how this man, bred in a city, in high social position, having no opportunity to know the modes of thought and of life of poor men and of rustics, would settle these interesting and delicate questions, affecting so deeply the life of plain men and country farmers, and with what unerring sagacity he came to the wise and righteous result.

The following account of Judge Gray's service upon the Supreme Court of Massachusetts has been kindly furnished for this memoir by Mr. Justice Loring: —

Judge Gray was a remarkably accurate lawyer and a man who was remarkably accurate in statement; but the characteristic of his opinions is the abundance of learning with which they are written. They fairly teem with it. His opinions contain an unusually good collection of cases, not only in Massachusetts but also in other States of the Union

and in England, and where the case admitted of it, a full statement of the history of the question. Where the history involved was that of the Colony or of the Province, he fairly revelled in pouring forth a wealth of quaint and antiquarian learning which make these opinions a matter of delight as well as of instruction. His first opinion (Pomeroy *v.* Trimper, 8 Allen, 398) is characteristic of much of his subsequent work. It is the first opinion of the full court for the September term in Berkshire, where he took his seat upon the bench. In it he discusses the question whether in replevin there must be an allegation of the value of the property replevied. He discusses the practice under the Massachusetts Colony, under the Plymouth Colony, and under the Province, bringing together a long collection of acts of the two Colonies, and of the Province. He notices the cases in which the value has been alleged and the connections in which the allegation might be important, although not necessary. After three pages of delightful and illuminating discussion, he points out that in the case under consideration the writ might have been amended, and that its omission was waived by a general rule of reference to referees, and therefore it was not necessary to decide the question. In the same case he disposes of the objection that a heifer was misdescribed as a cow by a case from the Year Book 26 H. VIII., p. 6, pl. 27, in which such a writ was held good, "for it may be that it was a heifer at the time of taking out the replevin and that it is now a cow."

The most surprising and almost incredible thing about Judge Gray's opinions is that, being written as if the days were forty-eight hours long, for him at any rate, he should have produced so many of them. During the nine years he was an associate justice he wrote 515 opinions, and during the eight years and four months that he was Chief Justice he wrote 852 opinions, making 1,367 opinions in seventeen years and four months. It is worthy of note that during the first eight of the nine years in which he wrote only 515 opinions, he wrote only three opinions less than his share, assuming that the share of the Chief Justice was no greater than that of an associate justice. During the last of these nine years a seventh justice was appointed in the middle of the year, and it would be difficult to make a comparison. The first year that he was Chief Justice he wrote 133 out of 484 opinions written by all seven justices, and during the next three years, 120 out of 427, 131 out of 415, and 105 out of 403, respectively, a good deal more than a quarter of all the opinions written during those four years, and making for those four years only 26 fewer opinions than were written by him during the nine preceding years. And this, too, when the court had not been relieved of its jurisdiction over actions of tort (as was done later by St. 1880, c. 28) or of its jurisdiction in cases of divorce (as was subsequently done by St. 1887, c. 332). That is to say, the Supreme Judicial

Court at this time was a court having a general common-law jurisdiction (where the amount involved was sufficiently large); it was the only court of equity; it was the only court for divorce, and it was the supreme court of probate.

One cannot but ask how Judge Gray could have written such opinions and so many of them in addition to his duties outside of work on the full court. In the first place, Judge Gray was a good lawyer. He did not make mistakes. In the second place, his devotion to his profession was like that of a holy priest to his religion. Again, his strength for mental work was enormous, and he had a memory which was phenomenal, — a memory which went not only to the fact that a point of law had been decided, but to how it had been decided, the name of the case where it had been decided, and the volume where that case was to be found. And, last and not least, he was one of those very rare men who have the facility of reading a page almost at a glance. After the summer of 1875 he always worked with the assistance of a young lawyer as a clerk. But during two and one-half of the four years in which he produced the largest number of opinions, he worked without any assistance, and it was in the first of these two in which the greatest number were written.

When the pressure of work outside of the full court is considered, it is almost incredible that Judge Gray should have written so many opinions, and so many opinions of the kind which he wrote. There are instances where a notable collection of cases is not accompanied by an analysis of them. Hill *v.* Boston, 122 Mass. 344 (itself a leading case), is an example of this. The wonder, however, is not that there are such cases, but, when all is considered, that there are not more of them.

Judge Gray wrote but one dissenting opinion during the seventeen years that he was on the State bench. It was in the case of Hinckley *v.* Cape Cod Railroad, 120 Mass. 257, 260. Judge Marcus Morton, one of the best common-law judges who ever sat on the bench, concurred in this dissent. Judge Gray was a judge with strong convictions as to law, and one cannot but infer that the reason why more dissenting opinions were not written by him was because he persuaded his associates to his way of thinking.

Weighed by the number of cases which stand out as landmarks, Judge Gray is in the front rank of the leaders. Saltonstall *v.* Sanders, 11 Allen, 446, and Jackson *v.* Phillips, 14 Allen, 539, on charitable trusts, are perhaps the most notable. Before he came to the bench, he made the law of flats his own in his note to Commonwealth *v.* Roxbury, 9 Gray, 503, and followed this up in his opinions in Richardson *v.* Boston, 13 Allen, 146, and Boston *v.* Richardson, 105 Mass. 351. The cases of Briggs *v.* Light Boats, 11 Allen, 157; Coombs *v.*

New Bedford Cordage Co., 102 Mass. 572; Richardson *v.* Sibley, 11 Allen, 65; Bronson *v.* Coffin, 108 Mass. 175; Haskell *v.* New Bedford, 108 Mass. 208, and Hill *v.* Boston, 122 Mass. 344; Exchange Bank *v.* Rice, 98 Mass. 288; Waters *v.* Stickney, 12 Allen, 1; Greenfield Savings Bank *v.* Stowell, 123 Mass. 196; Guild *v.* Butler, 127 Mass. 386; Gorham *v.* Gross, 125 Mass. 232; Clapp *v.* Ingraham, 126 Mass. 200; Low *v.* Elwell, 121 Mass. 309, are as familiar to the practising lawyer as household words. The difficulty is not in making this list, but in not making it too long for a notice of this kind.

Outside of the full court, Judge Gray's chief service was in establishing the jurisdiction and practice in equity, in improving the details of practice and making it uniform in the several counties, and more than all in maintaining in the conduct of the business of the court the dignity which marks court proceedings in this Commonwealth.

In 1864, when Judge Gray came on the bench, equity had been practised but little and the knowledge of it was scant. Judge Gray was an excellent judge on this side of the court. He took more than his share in equity sittings, and the minute oversight which he bestowed on the details of practice found in this new field an opportunity which has borne fruit for which the Commonwealth is much beholden.

In matters of practice, on both sides of the court, Judge Gray was a leader, not a follower. He knew the principles and the application of practice thoroughly, and it is not too much to say that no detail was too minute for his watchful oversight or too uncommon for his knowledge. He looked after practice as he did after the reports when he was Chief Justice. I have been told by one who was a reporter at the time that it was the custom of Judge Gray to read the proofs of all the opinions, and that he had the reporter leave proofs at his house as he went home at night, and call for them as he went to his office in the morning.

In the conduct of business in the court-room he was a strict disciplinarian. At times some members of the bar were restive under his rule. But he mixed kindness with discipline, and the ensuing benefit is fully recognized to-day.

And so it came to pass that when the place of Mr. Justice Clifford became vacant, by the almost universal consent of the New England Circuit, with the general approval of the profession throughout the whole country, Mr. Justice Gray became his successor.

The appointment was in fact made by President Arthur. In the spring of 1881, Mr. Justice Clifford, whose mental faculties had been seriously impaired, left Washington for his home in Maine. Before he left some of his family authorized

the statement to be made to President Garfield that the Judge was going home, and that his resignation would come to Washington directly after his arrival there. This was well known to the members of the Senate from the New England Circuit, and to other persons interested in the appointment of a successor. President Garfield took up the matter with the expectation of making the appointment very soon. But when Mr. Justice Clifford reached home he was unwilling to take the step of resigning, and it is said, although his mental health was not in fact restored, that he declared his hope of resuming his duties again. General Garfield's death took place shortly afterward. That of Mr. Justice Clifford soon followed.

President Garfield desired me to furnish him with a collection of what I thought were the Chief Justice's best opinions. I requested Judge Hoar, who had been Judge Gray's partner and who thought very highly of him indeed, to perform that service. He asked the Chief Justice if he would tell him what he regarded as his best and most important opinions. But Judge Gray suspected the motive of the request and declined to comply with it. He preferred, I have no doubt, to have absolutely nothing to do, directly or indirectly, with influencing his own selection to that great office.

The appointment was received with almost universal satisfaction by the bar and bench throughout the country. I have good reason to know that it gave special pleasure to his brethren of the Supreme Court of the United States, all of whom knew his great ability and learning, and some of whom knew him well in private.

The following statement of Mr. Justice Gray's service on the Supreme Court of the United States, by Hon. J. Hubley Ashton of the Bar of the District of Columbia, formerly associated with the late Attorney-General Hoar as Assistant Attorney-General, contains, as it seems to me, a biographical sketch of Judge Gray composed in a manner in which he himself would have most delighted, and such a sketch as he himself would have made if it had been committed to him to perform the same task for any other great jurist.

The service of Mr. Justice Gray in the Supreme Court of the United States extended from January 9, 1882, in October Term, 1881,

when he took the oath of office as Associate Justice under his commission bearing date December 19, 1881, until his death on September 15, 1902. During that period Chief Justice Waite and Chief Justice Fuller successively presided over the court, and the other Associate Justices at different times were Justices Miller, Field, Bradley, Hunt, Harlan, Woods, Matthews, Blatchford, Lamar, Brewer, Brown, Shiras, Jackson, White, Peckham, and McKenna. On January 30, 1882, he was allotted to the First Judicial Circuit, composed of Maine, New Hampshire, Massachusetts, and Rhode Island, which he always retained; becoming when in attendance the head of the Circuit Court of Appeals for that circuit under the provisions of the Judiciary Act of March 3, 1891, known as the Evarts Act, which distributed the entire appellate jurisdiction of the national judicial system between the Supreme Court of the United States and the new Circuit Courts of Appeals, and made the judgments of the latter courts final except in extraordinary cases. He presided at the first meeting of the Circuit Court of Appeals for the First Circuit, at Boston, on June 16, 1891, sitting with Colt, Circuit Judge, and Nelson and Webb, District Judges, and took part in the hearing and decision of several of the first cases determined by that court.

The opinions delivered by him from the bench of the Supreme Court of the United States during the term of his service there, are to be found in eighty-one volumes of the Reports of the court, from 104 U. S. to 184 U. S. inclusive, and number some four hundred and fifty-one, including ten dissenting opinions in which he stated at length the grounds of his disagreement with the majority of the court in important cases. In forty-one other cases, in which he dissented from the judgments of the court, he prepared or filed no opinions, simply stating the fact of his dissent or expressing his concurrence in the opinions delivered by other dissenting justices.

It thus appears that during his twenty-odd years of service in the court he deemed it necessary or proper to announce publicly his dissent from the judgments rendered by it in fifty-nine cases only. This is a small proportion of dissents, as the cases adjudged by the court upon reasoned opinions during that period numbered several thousands. It was probably his rule, where he disagreed with the majority of his brethren, not to announce his dissent except in cases of general interest, and to prepare opinions stating at length the grounds of his disagreement only in cases of public importance.

The opinions delivered by him for the majority of the court in the prize case of The Paquete Habana, 175 U. S. 677 (1899), and the case of Hilton *v.* Guyot, 159 U. S. 113 (1894), are among the most learned and noteworthy of his writings, and among the most memorable judgments in the books on great questions of international jurisprudence.

In The Paquete Habana it was determined by the court that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The opinion of Mr. Justice Gray is a profound study of a difficult and most interesting question in the modern law of maritime prize in view of the just and humane sentiments of civilized nations in our times, and containing as it does the body of the public jurisprudence on the subject, this judgment must find a place in any future collection of leading cases on International Law.

The case of Hilton *v.* Guyot, argued three times at the bar, involved important questions of private international law relating to the force and effect of foreign judgments not theretofore adjudicated by the Supreme Court of the United States, and his opinion, with that of the dissenting justices, has been included in the third volume of Professor Beale's valuable "Selection of Cases on the Conflict of Laws," containing the leading authorities on the subject of the recognition and enforcement of rights.

In this reference to some of the noteworthy judgments of Mr. Justice Gray on questions of international law, may be mentioned the elaborate dissenting opinion delivered by him at October Term, 1901, in the important case of Tucker *v.* Alexandroff, 183 U. S. 424, 449, in which he expressed his view that the authorities of the United States had no power, under the treaty with Russia of 1832 or otherwise, to surrender the appellee as a deserter from the Variag under construction for the Russian Government at Philadelphia.

"The treaties of the United States with Russia and with most of the nations of the world," he said, "must be considered as defining and limiting the authority of the Government of the United States to take active steps for the arrest and surrender of deserting seamen. These treaties must be construed so as to carry out, in the utmost good faith, the stipulations therein made with foreign nations. But neither the executive nor the judiciary of the United States has authority to take affirmative action, beyond the fair scope of the provisions of the treaty, to subject persons within the territory of the United States to the jurisdiction of another nation."

The judgment delivered by him for the majority of the court in the great case of United States *v.* Wong Kim Ark, 169 U. S. 649 (1897), and his judgments for the whole court in the leading cases of Van

Brocklin *v.* State of Tennessee, 117 U. S. 151 (1885), Jones *v.* United States, 137 U. S. 202 (1890), Shively *v.* Bowlby, 152 U. S. 1 (1893) and Belknap *v.* Shield, 161 U. S. 10 (1895), are among the most interesting of his opinions in important cases involving general questions of constitutional law.

The case of United States *v.* Wong Kim Ark presented a momentous question in the public law of the United States respecting the source and foundation of the principles of American nationality, and the interpretation and effect of that clause of the Fourteenth Amendment of the Constitution which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

It was adjudged by the Court that under the Constitution a child born in the United States of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent domicile and residence in the country, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Government of China, becomes, when born, a citizen of the United States.

The case of Van Brocklin *v.* Tennessee finally determined that all property of the United States is absolutely exempt by the Constitution from taxation under the authority of any State without the consent of the United States.

The judgment in Jones *v.* United States sustained the constitutionality of the Guano Islands Act of August 16, 1856, c. 164, and affirmed the validity of a conviction in the District Court of the United States for the District of Maryland for a murder committed at the Island of Navassa.

The opinion in Shively *v.* Bowlby is an exhaustive treatment of the subject of the rights of the States of the Union in the tide waters and the lands under them, within their respective jurisdictions, and adjudged that a donation claim bounded by the Columbia River, acquired under the Act of Congress of September 27, 1850, c. 76, while Oregon was a Territory, passed no title or right in lands below high-water mark, as against a subsequent grant from the State of Oregon, pursuant to its statutes.

In Belknap *v.* Shield it was finally adjudged by the court that officers and agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent.

The opinion delivered by Mr. Justice Gray in that case contains a careful statement of the decision in United States *v.* Lee, hereinafter referred to, in which he dissented from the opinion of the majority of the court.

It is difficult to discriminate and select, where there is such wealth of material, for the purpose of the present statement, but the most noteworthy, perhaps, of his later judgments for the court in cases involving general and important questions of constitutional law, are those he delivered in Atherton *v.* Atherton, 181 U. S. 155 (1900), and Bell *v.* Bell, ib. 175, which conclusively determined that no valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party to the suit is domiciled; Carter *v.* Texas, 177 U. S. 442 (1899), declaring that whenever, by any action of a State, whether through its legislature, its courts, or its executive or administrative officers, persons of the African race are excluded solely because of their race or color from serving as grand jurors in the prosecution of a person of that race for crime, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States; and Capital Traction Company *v.* Hof, 174 U. S. 1 (1898), where he elaborately examined the whole subject of "trial by jury" at the common law, in the American constitutions, and as secured by the Seventh Amendment to the Constitution of the United States.

In the important case of Illinois Central Railroad *v.* Illinois, 146 U. S. 387, 464 (1892), he concurred in the dissenting opinion of Mr. Justice Shiras declaring "that the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State."

He delivered an interesting dissenting opinion in United States *v.* Rodgers, 150 U. S. 249, 266 (1893), expressing his view that the open waters of the Great Lakes are not "high seas" within the meaning of sec. 5346 of the Revised Statutes of the United States on which the indictment in that case was founded, although "within the admiralty jurisdiction of the United States" under the decision in The Genesee Chief, and Congress had undoubted power to punish crimes on American vessels, wherever they may float.

One of the most elaborate of his constitutional opinions is his dissent of seventy-one pages, concurred in by Mr. Justice Shiras, in the important case of Sparf and Hansen *v.* United States, 156 U. S. 51, 110 (1894), in which he maintained that by the instructions of the court to the jury the defendants on trial in the Circuit Court of the United States for murder on the high seas, were deprived of their right to have the jury decide the law involved in the general issue.

"The jury," he said, "must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But if they are satisfied in their consciences that the law is

other than as laid down to them by the court, it is their right and their duty to decide the law as they know or believe it" (p. 172).

He concurred, with Mr. Justice White, in the dissenting opinion written by Mr. Justice Shiras in the important case of Brown *v.* Walker, 161 U. S. 591, 610 (1895), to the effect that the Fifth Amendment of the Constitution, declaring that no person should be compelled in any criminal case to be a witness against himself, intended not merely that every person should have such indemnity, but that his right thereto should not be divested or impaired by any Act of Congress, and that the provision of the Act of February 11, 1893, c. 83, involved in that case, was void because incompatible with this great constitutional guaranty.

The strong views held by Mr. Justice Gray in regard to the sovereignty of the United States, and its relation to the citizen, early appeared in his well-known dissenting opinion in the celebrated case of United States *v.* Lee, 106 U. S. 196, 223 (1882), which was the first important opinion delivered by him from the bench of the Supreme Court. The majority of the court having affirmed the jurisdiction of the Circuit Court below to try the question of the validity of the title of the United States to the Arlington estate, in Virginia, under a sale for direct taxes by the Commissioners appointed under the Act of Congress of June 7, 1862, ch. 98, in an action of ejectment against the officers and agents of the United States in possession and occupation of the premises, Mr. Justice Gray, with Chief Justice Waite, and Justices Bradley and Woods, dissented upon the grounds that the action was in legal effect a suit against the United States as sovereign, that the fundamental maxim of public law exempting the sovereign from being impleaded without its consent, is not limited to a monarchy, but is of equal force in a republic, and applies to the United States as well as to the Crown of England, and that to maintain the action was to encroach upon the powers of the legislative and executive departments of the government.

This opinion is the more noteworthy as it was the doctrinal precursor in a measure of his celebrated opinion, at the next term, in the most important case that had ever been in the court since the foundation of the government, the case of Juilliard *v.* Greenman, known as the Legal Tender Case, 110 U. S. 421 (1883), in which it was finally adjudged that Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war, and that under the Act of May 31, 1878, ch. 146, providing that when any United States legal tender notes may be redeemed and received into the treasury they shall be reissued and paid out again, notes so reissued are a legal tender.

This was the last of the great legal tender litigations, and the de-

cision no doubt carried the implied powers of Congress under the Constitution beyond any point theretofore reached by the court in its adjudications.

"Congress," said Mr. Justice Gray, "as the legislature of a sovereign nation, being expressly empowered by the Constitution 'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin'; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the Government of the United States.'"

The opinion, as is well known, was concurred in by Chief Justice Waite, and all the other Associate Justices except Mr. Justice Field.

The same general constitutional doctrine in respect to the powers of the United States, as a nation among nations, lies at the foundation of his opinion in Nishimura Ekiu *v.* United States, 142 U. S. 651 (1891), affirming the validity of the Act of March 3, 1891, c. 551, forbidding certain classes of alien immigrants to land in the United States, and of his judgment for the majority of the court in the leading Chinese Deportation Cases, reported as Fong Yue Ting *v.* United States, 149 U. S. 698 (1892), which upheld the constitutionality of the Act of Congress of May 5, 1892, ch. 60, known as the Geary Act, as a law for the expulsion from the country of certain resident Chinese aliens, upon the ground that the right to exclude or expel aliens, or any class of aliens, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, and in the United States is vested in the political department of the National Government, and may be exercised entirely through executive officers, or Congress may call in the aid of the judiciary to ascertain any contested fact on which an alien's right to be in the country has been made by Congress to depend.

Chief Justice Fuller and Justices Field and Brewer dissented in separate and extended opinions from the judgments of the court in the

latter cases. Mr. Justice Harlan, being absent abroad, took no part in the hearing and decision of the cases, although the fact appears not to be mentioned by the Reporter.

It may be proper to classify with the judgments of Mr. Justice Gray in these great constitutional cases, with respect to the sovereignty of the United States and its powers of government under the Constitution, his very brief opinions in the so-called Insular Cases, in which he affirmed the constitutionality of the Foraker Act of April 12, 1900, ch. 191, in respect to the system of duties established by the Act for Porto Rico, and dissented from the ruling in De Lima *v.* Bidwell, and Fourteen Diamond Rings *v.* United States, as to the status of that island, and the Philippine Islands, after and in consequence of the ratification of the Treaty of Peace between the United States and Spain, April 11, 1899. 182 U. S. 344 (1900), 183 U. S. 185 (1901). As stated in his short opinion of two pages and a half in Downes *v.* Bidwell respecting the Foraker Act, he agreed "in substance" with the elaborate opinion delivered by Mr. Justice White in that important case. He also concurred in the dissenting opinion of Mr. Justice White in Dooley *v.* United States, 182 U. S. 236 (1900), that the right to exact duties upon imports from New York to Porto Rico did not cease with the ratification of the Treaty of Paris.

He delivered the judgment of the court in Logan *v.* United States, 144 U. S. 263 (1891), reaffirming the doctrine of the case of Neagle, 135 U. S. 1, that "every right, created by, arising under, or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

"The United States," he said, "are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defence."

The doctrine was again affirmed by him, speaking for the court, in the case of Quarles and Butler, Petitioners, 158 U. S. 532 (1894), where he declared: "The United States are a nation, whose powers of government, legislative, executive, and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount."

It may be proper to mention, in this connection, that he was one of the majority of the court in the decision of Pollock *v.* Farmers' Loan and Trust Company, 157 U. S. 429, 158 U. S. 601 (1894), which

declared the Income Taxes imposed by the Act of August 15, 1894, unconstitutional, and no doubt concurred in the reasoning of the opinions of the court, delivered by Chief Justice Fuller, in that celebrated case.

While he entertained strong views in regard to the sovereignty and powers of the National Government, Mr. Justice Gray, as his judicial writings show, upheld with a firm and no uncertain hand the legislation of the States in regard to the subjects deemed by him within their jurisdiction and authority under the powers reserved to them by the Constitution of the United States.

He concurred, with Chief Justice Waite, in the dissenting opinion of Mr. Justice Bradley in Wabash, etc. Railway Company *v.* Illinois, 118 U. S. 557 (1886), that in the absence of congressional legislation a State legislature possesses the power to regulate the charges made by the railroads of the State for transporting goods and passengers to and from places in the State, when such goods or passengers are brought from, or carried to, points without the State, and are therefore in the course of transportation from another State, or to another State, although such a regulation incidentally operates to a certain extent as a regulation of interstate commerce.

He also concurred in the dissenting opinion of Mr. Justice Bradley in Chicago, etc. Railway Co. *v.* Minnesota, 134 U. S. 418 (1889), in favor of the constitutionality of the Minnesota Statute of 1887, regulating, through a railroad commission, the rates of charges on railways, as not depriving the company of its property without due process of law or denying it the equal protection of the laws.

He also dissented, with Chief Justice Fuller and Mr. Justice McKenna, from the judgment of the majority of the court in Lake Shore, etc. Railway Company *v.* Smith, 173 U. S. 684 (1898), declaring invalid an Act of the State of Michigan which required railroad companies to keep for sale at a price not exceeding a certain sum one thousand mile tickets that should be valid for a prescribed time, as in violation of the rights of the companies under the Constitution of the United States.

At October Term, 1895, Mr. Justice Gray delivered the unanimous opinion of the court in Illinois Central Railroad Company *v.* Illinois, 163 U. S. 142, declaring unconstitutional the statute of Illinois, there involved, in its application to that company, as directly burdening interstate commerce, and obstructing the passage of the mails of the United States.

At the next term he delivered the judgment of the court in Gladson *v.* Minnesota, 166 U. S. 427 (1896), holding that a statute of that State requiring all regular passenger trains, running wholly in the State, to stop at stations at all county seats through which they might

pass, was a lawful exercise of the police power of the Legislature, and not a regulation of interstate commerce.

He was one of the majority of the court in the decision of the later and important case of Lake Shore and Michigan Southern Railway Company *v.* Ohio, 173 U. S. 285 (1898), which sustained the legislation of the State of Ohio requiring every railroad company to stop a certain number of its passenger trains at stations containing three thousand inhabitants, as not repugnant to the Constitution when applied to interstate trains carrying interstate commerce.

Such legislation he did not regard as directly burdening or impeding interstate traffic, or impairing the usefulness of facilities for such traffic.

In St. Louis & San Francisco Railway Company *v.* Matthews, 165 U. S. 1 (1896), he wrote the elaborate opinion of the court sustaining the Missouri Statute of 1887 making every railroad corporation owning or operating a railway in the State responsible in damages for property of any person destroyed or injured by fire communicated by its locomotive engines, as a valid exercise of the police power of the State.

In his well-known dissenting opinion in the leading case of Leisy *v.* Hardin, 135 U. S. 100 (1889), Mr. Justice Gray affirmed the validity of a statute of Iowa prohibiting the sale of intoxicating liquors, except for limited purposes under State license, as applied to a sale by the importer, in the original packages, of such liquors manufactured in and brought from another State, against the judgment of the court, delivered by the Chief Justice, which treated the early case of Peirce *v.* New Hampshire, 5 Howard, 504, decided in 1847, as overruled.

"Congress," he said, "cannot regulate this subject under the police power, because that power has not been conceded to Congress, but remains in the several States; nor under the commercial power, without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which it was the object of the commercial clause of the Constitution to secure."

After the decision in Leisy *v.* Hardin, and, perhaps, in consequence of the dissent, in that case, Congress passed the Act of August 8, 1890, ch. 728, commonly known as the Wilson Act, providing that all intoxicating liquors transported into any State, in the original packages or otherwise, should upon arrival be subject to the operation of its laws in the exercise of its police power.

He concurred in the judgment of reversal in Rahrer's Case, 140 U. S. 545 (1890), which affirmed the validity of the Wilson Act, though not in all the reasoning of the opinion of the Chief Justice.

The history of the adjudications, in these important cases, was reviewed by him in his dissenting opinion in Rhodes *v.* Iowa, 170 U. S.

412 (1897), the judgment in which appeared to him to deny due effect to the police power, reserved to each State by the Constitution of the United States, and recognized by Congress, in the Wilson Act, which he was in favor of maintaining. He said, in that case: "The question whether the power of Congress to regulate commerce with foreign nations and among the several States is exclusive, or only paramount, was a subject of much diversity of opinion from an early period until 1851, when this court, speaking by Mr. Justice Curtis, in Cooley *v.* Board of Wardens, 12 Howard, 299, laid down this principle: When the nature of the particular subject in question is such as to demand a single uniform rule, operating equally throughout the United States, the power of Congress is exclusive; but when the subject is of such a nature as to require different systems of regulation, drawn from local knowledge or experience, and conformed to local wants, it may be the subject of State legislation so long as Congress has not legislated. The principle there laid down has become fully recognized and established in our jurisprudence. Transportation Co. *v.* Parkersburg, 107 U. S. 691, 704; Crandall *v.* Nevada, 6 Wall. 35, 42; Mobile County *v.* Kimball, 102 U. S. 691, 701.

"Wherever, from the nature of the subject, the power of Congress to regulate commerce is exclusive, the several States, of course, cannot legislate, even if there has been no legislation by Congress; or, as the proposition has been stated in another form, 'where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom.' Robbins *v.* Shelby Taxing District, 120 U. S. 489, 493.

"The theory that the bringing of intoxicating liquors from one State into another, and the selling of them there in the packages in which they had been introduced, are subjects requiring to be regulated by a national and uniform rule, and therefore within the exclusive power of Congress, and wholly free from State legislation, was not broached by any member of the court before the cases of Bowman *v.* Chicago and Northwestern Railway, 125 U. S. 465, and Leisy *v.* Hardin, 135 U. S. 100."

This is his own clear and comprehensive statement of his constitutional doctrine on the subject of the power of Congress to regulate interstate commerce.

At October Term, 1890, he dissented from the judgment of the court by Mr. Justice Bradley in Crutcher *v.* Kentucky, 141 U. S. 47, declaring void a law of Kentucky requiring from the agent of every express company, not incorporated by the State, a license before he could carry on any business for the company in the State, as a regulation of inter-

state commerce, and not a regulation in the fair exercise of the police power of the State.

He delivered, in 1894, the elaborate judgment of the court in Emert *v.* Missouri, 156 U. S. 296, affirming the validity of a statute of Missouri compelling itinerant peddlers to take out licenses.

At the same term he was one of the majority of the court in the decision of the case of Plumley *v.* Massachusetts, 155 U. S. 461, which sustained the Massachusetts statute of March 10, 1891, ch. 58, to prevent deception in the manufacture and sale of "imitation butter," in its application to the sales of oleomargarine artificially colored so as to cause it to look like butter, and brought into the State, as not in conflict with the commercial clause of the Constitution of the United States.

He dissented from the judgment of the majority of the court in the oleomargarine case of Schollenberger *v.* Pennsylvania, 171 U. S. 25 (1897), which pronounced invalid an Act of the Legislature of Pennsylvania to the extent that it prohibited the introduction of oleomargarine from another State and its sale in the original packages, and declared his opinion that "each State may, in the exercise of its police power, without violating the provisions of the Constitution and laws of the United States, concerning interstate commerce, make such regulations relating to all sales of oleomargarine within the State, even in original packages brought from another State, as the Legislature of the State may deem necessary to protect the people from being induced to purchase articles, either not fit for food, or differing in nature from what they purport to be; and that, if the Legislature is satisfied that oleomargarine is unwholesome, or that in the tubs or packages in which it is commonly offered for sale it looks so like butter that the only way to protect the people against injury to health in the one case or against fraud or deception in the other, is to absolutely prohibit its sale, it is within the constitutional power of the Legislature to do so." And in the next case of Collins *v.* New Hampshire, *ib.* 30, he expressed his dissent from the decision of the majority of the court adjudging to be invalid a statute of that State which prohibited the sale of oleomargarine as a substitute for butter, unless it was of a pink color, upon the ground that the statute was in contravention of the commerce clause of the Constitution of the United States.

He delivered the prevailing opinion in Pullman's Car Company *v.* Pennsylvania, 141 U. S. 18 (1890), which affirmed the power of the State of Pennsylvania to tax a proportion of the capital stock of the Pullman's Car Company, an Illinois corporation, as not in derogation of the commercial power of Congress, under the general principles that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State.

He also delivered the judgment of the majority of the court in Massachusetts *v.* Western Union Telegraph Company, 141 U. S. 40 (1890), sustaining the legislation of the State of Massachusetts imposing a tax, which, though nominally upon the shares of the capital stock of the Telegraph Company, was in effect a tax upon the company on account of property owned and used by it in Massachusetts, as not in violation of the Constitution or the rights conferred upon the corporation by the National Telegraph Act of July 24, 1866, ch. 230.

He composed one of the majority of the judges in the determination of the important cases of Adams Express Company *v.* Ohio, 165 U. S. 194 (1896), and Adams Express Company *v.* Kentucky, 166 U. S. 171 (1896), which upheld the schemes of State taxation in respect to the property of the Express Company, there involved, as not in contravention of the Constitution.

In the great cases of United States *v.* Trans-Missouri Freight Association, 166 U. S. 290 (1896), and United States *v.* Joint Traffic Association, 171 U. S. 505 (1898), under the so-called Trust Act of July 2, 1890, Mr. Justice Gray dissented from the judgments of the majority of the court, and concurred in the dissenting opinion of Mr. Justice White, in the first of those cases, that the words "restraint of trade," in the Act, only embraced contracts which unreasonably restrain trade, and that the statute was not intended to interfere with the control and regulation of railroads under the Interstate Commerce Act or with acts of the companies which had theretofore been recognized as in conformity to and not in conflict with that Act.

The judgment delivered by him in Head *v.* Amoskeag Manufacturing Company, 113 U. S. 9 (1884), one of his early constitutional cases, sustained the general mill Act of the State of Massachusetts, authorizing lands to be flowed *in invitum* for the maintenance of mills, as not in violation of the Fourteenth Amendment of the Constitution.

The last of his important judgments was delivered in Nutting *v.* Massachusetts, 183 U. S. 553 (1901), in which he upheld as constitutional the rigorous penal provisions of the statute of Massachusetts designed to prevent foreign insurance companies from doing business within the limits of the State except upon such conditions as the State by the Act had prescribed.

It should be mentioned, in this connection, that he was one of the majority in the decision of the last case during his term of service involving the subject of the police power of the States and the power of Congress over interstate commerce, in which the court was divided, namely, Austin *v.* Tennessee, 179 U. S. 343 (1900), where it was held that it is within the province of a State legislature to declare how far cigarettes may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of

the importer, if there be no discrimination against those imported from other States, and the Act is plainly designed for the protection of the public health, as the Tennessee Act under examination was adjudged to be. The Chief Justice, with Justices Brewer, Shiras, and Peckham, dissented from the opinion and decision of the court. In any view of that case, there would appear to be nothing in the decision itself inconsistent, at least, with the principles of the dissenting opinions of Mr. Justice Gray in Leisy *v.* Hardin, and Rhodes *v.* Iowa, which have been referred to, and it is not improbable that he voted for the affirmance of the judgment of the Supreme Court of Tennessee as right according to those principles.

It is manifest, from this brief review of his constitutional opinions, that it was the doctrine of Mr. Justice Gray that the Constitution, in all its provisions, looks to a sovereign nation composed of sovereign States.

He delivered, it may be mentioned, the opinions of the Supreme Court in a number of cases involving important questions relating to its original and appellate jurisdiction, which were evidently prepared with the care appropriate to the subject.

In Wisconsin *v.* Pelican Insurance Company, 127 U. S. 265 (1887), he comprehensively reviewed the adjudications of the court respecting the nature and extent of its original jurisdiction under the Constitution, and announced its decision that this jurisdiction did not embrace an action by a State upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another State for a pecuniary penalty for a violation of its municipal law.

The opinions delivered by him in New Orleans Waterworks *v.* Louisiana Sugar Company, 125 U. S. 18, and Central Land Company *v.* Laidley, 159 U. S. 103, are among the leading authorities in the books on the subject of the extent of the appellate jurisdiction of the Supreme Court of the United States to review the judgments of the highest courts of the States under that clause of the Constitution which protects the obligation of contracts against impairment by any State "law."

During his period of service on the Supreme Bench, Mr. Justice Gray delivered judgments in a number of leading cases within the admiralty and maritime jurisdiction of the court, which possess in a marked degree the best qualities of his judicial writings, perfect clearness of thought, precision of statement, and accuracy of learning, and which seem to disclose his well-known fondness for the department of jurisprudence embraced by that jurisdiction.

Some of his noteworthy admiralty opinions, to mention a few only, will be found in The Potomac, 105 U. S. 630 (1881); Phœnix Insurance Company *v.* Erie Transportation Company, 117 U. S. 312 (1885);

Liverpool Steamship Company *v.* Phenix Insurance Company, The Montana, 129 U. S. 397 (1883); The J. E. Rumbell, 148 U. S. 1 (1892); Ralli *v.* Troop, 157 U. S. 386 (1894); The John G. Stevens, 170 U. S. 113 (1897); The Silvia, 171 U. S. 462 (1898); Crossman *v.* Burrill, 179 U. S. 100 (1900); Knott *v.* Botany Mills, The Portuguese Prince, 179 U. S. 69 (1900).

It was finally determined by the Supreme Court in one of the most important of these cases, Liverpool Steamship Company *v.* Phenix Insurance Company, known as The Montana, that the general maritime law is in force in this country as far only as it has been adopted by the laws and usages thereof, and that a contract of affreightment in an American port by an American shipper with an English steamship company, doing business there, for the shipment of goods there and their carriage to and delivery in England, the freight being payable in English currency, is an American contract governed by American law in respect to the effect of a stipulation exempting the carrier from responsibility for negligence of his agents in the course of the voyage.

One of the most interesting opinions in the books on the admiralty jurisdiction was delivered by him in The Glide, 167 U. S. 606 (1896), where the court reversed a judgment of the Supreme Judicial Court of Massachusetts, and determined that the enforcement *in rem* of the lien upon a vessel, created by the statutes of that State, for repairs and supplies in her home port, is exclusively within the admiralty and maritime jurisdiction of the courts of the United States.

Mr. Justice Gray, it should be mentioned, dissented in an elaborate opinion from the judgment in Workman *v.* New York City, etc., 179 U. S. 552, 574 (1900), where it was determined by the majority of the court that a libel in admiralty *in personam* could be maintained against the City of New York for an injury to a vessel lying in a dock from being run into by a fire-boat, owned by the city, through negligence of members of its fire department, while engaged in the performance of their official duties. With Justices Brewer, Shiras, and Peckham he was unable to concur in the reasoning of the opinion of Mr. Justice White in that interesting and important case. He thought that a libel in admiralty could not be maintained, as for a tort, upon a cause of action on which, by the law prevailing throughout the country, no action at law could be sustained.

One of the very last of his important opinions, as may be mentioned in this connection, was in the leading case of Homer Ramsdell Company *v.* La Compagnie Générale Transatlantique, 182 U. S. 406 (1900), which finally adjudged that in an action at common law the ship-owner is not liable for injuries inflicted exclusively by the negligence of a pilot accepted by a vessel compulsorily, as under the statutes of New York, although by the decisions of the Supreme Court of the United

States the ship may be responsible in admiralty, where the owner would not be at common law, differing in that respect from the English cases in admiralty.

The observation of Chief Justice Fuller in his response to the resolutions of the Bar on the death of his eminent associate in regard to the habit of Mr. Justice Gray of making cases leading when he thought the occasion demanded, is well illustrated by a number of his judgments in cases at law and in equity presenting important questions in the general municipal law of the country. A few only of these judgments can be here mentioned.

In the introduction to his opinion in Warner *v.* Texas and Pacific Railway Company, 164 U. S. 420 (1896), relating to the Texas Statute of Frauds, which re-enacted Sec. 4 of the Statute of 29 Car. II, ch. 3, he said: "This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England and of the several States." His treatment of that subject in the opinion necessarily made the case a leading one in the decisions of the court.

The elaborate opinion of Mr. Justice Gray in Primrose *v.* Western Union Telegraph Company, 154 U. S. 1 (1894), on the important subject of the effect and validity of the usual stipulations between telegraph companies and the senders of messages in respect to the liability of the corporations for mistakes in the transmission or delivery of such messages, has been of infinite value to the courts and the profession throughout the country.

Central Transportation Company *v.* Pullman's Car Company, 139 U. S. 24 (1890), where he reviewed the subject of the contracts of corporations *ultra vires*, finally determined as the law of the Supreme Court that no action was maintainable on such a contract.

His method of treating a great question of commercial law on which there was a supposed diversity of authority on the two sides of the Atlantic, is well illustrated by his learned opinion in the leading case of Norrington *v.* Wright, 115 U. S. 188 (1885).

His judgment in Gibbons *v.* Mahon, 136 U. S. 549 (1889), on the subject of stock dividends as an increase of the capital of a trust fund or income for the benefit of a life-tenant, may be mentioned as one of his noteworthy opinions on an interesting question of much general importance not theretofore considered by the Supreme Court.

The opinion of Mr. Justice Gray for the majority of the court in the case of McArthur *v.* Scott, 113 U. S. 340 (1884), construing the will involved in that case, and declaring the invalidity of the decree of the State court, setting aside the probate of the will, as against the com-

plainants, is recognized by the profession as one of the ablest of his judgments on difficult questions of technical law. The case is known as a leading one upon the subject of parties to suits in eqnity.

His judgments in Jones *v.* Habersham, 107 U. S. 174 (1882), involving the law of charities, and the capacity of corporations to hold and execute trusts for charitable objects, and Hopkins *v.* Grimshaw, 165 U. S. 342 (1896), adjudging that the rule against perpetuities is inapplicable to a trust estate resulting to the heirs of a grantor upon the failure of an express trust declared in the deed, are also among his noteworthy opinions on questions of technical law.

One of the most elaborate and interesting of his opinions on questions of general jurisprudence was delivered in the leading case of Huntington *v.* Attrill, 146 U. S. 657 (1892), which involved the subject of what laws of a State are penal laws in the international sense, and as such are not enforceable in the courts of another State, with reference to the jurisdiction of the Supreme Court of the United States to determine for itself on writ of error whether an original cause of action was penal in the international sense, when the highest court of the State declined to give full faith and credit to a judgment of another State, because in its opinion that judgment was for a penalty.

It is to be observed, with regard to the important use made of decided cases in many of the principal judgments of Mr. Justice Gray, that he was primarily a great common law lawyer, that the authority of judicial precedents as evidence of the unwritten law lies at the foundation of the common law of the English people on both sides of the Atlantic, and that the doctrine of *stare decisis* is a principle which is absolutely necessary to the formation and permanence of any system of jurisprudence.

While his juridical learning was profound and diversified, and he made extensive use of it when he thought the occasion required, it will be found by students of his opinions that he never loses sight of the point presented for judgment, and rarely decides more than the case upon the record properly requires. The opinions of few eminent judges are more free than his own from *obiter dicta.*

In view of the work of Mr. Justice Gray, it may be justly said that he ranks with Marshall, Story, and Curtis, and with Miller and Bradley, among the greatest judges in the history of the Supreme Court of the United States.

Judge Gray undertook, with great reluctance and after much pressure, to deliver the address on the life, character, and influence of Chief Justice Marshall, at Richmond, February 4, 1901, at the request of the State Bar Association of Virginia and the Bar Association of Richmond. That day

was the centennial of the first meeting of the Supreme Court of the United States at Washington, and of Chief Justice Marshall's taking his seat.

The Virginia bar were exceedingly desirous that this address should be given by a Massachusetts man. That was doubly appropriate because of the fact that Chief Justice Marshall had been appointed by John Adams, and, as the bar said in their invitation, "by reason of the cordial relations formerly existing between Virginia and Massachusetts, now so happily restored."

This address contains not only an admirable portraiture of the great Chief Justice, but it is a striking example of the best work of Justice Gray. It is noticeable how extensive and thorough must have been the research with which this brief memoir was prepared; how it deals with great qualities and not with those that are trifling; how unerring are its historic judgments; how rare the good fortune and how careful the inquiry that discovered the Autobiography which had escaped the notice of historians; and above all, how the orator, having called attention to great things said and done by his subject, abstains from extended personal comment or criticism, which he was so well calculated to make, and restrains any expression of the deep enthusiasm of which there can be no doubt his heart was full.

The writer would have profited little by an intimate friendship and companionship of more than fifty years with the subject of this memoir, if he were to permit even that friendship to betray him into anything of exaggeration in narrating the public service or in portraying the mental or moral quality of his friend. Yet I am sure there can be no exaggeration when I say what so many men of the first excellence, who know whereof they speak, men eminent upon the bench and at the bar of the United States and of the Commonwealth of Massachusetts, have said since his death. He took his place easily among the great judges of the world. He so bore himself in his great office as to command the approbation of his countrymen of all sections and of all parties. He was every inch a judge. He maintained the dignity of his office everywhere. He endeared himself to a large circle of friends at the national capital and at home in Massachusetts by his elegant and gracious hospitality. His life certainly was fortunate. The

desire of his youth was fulfilled. From the time when, more than fifty years ago, he devoted himself to his profession, until his death, there was no moment when he did not regard the office of a Justice of the Supreme Court of the United States as not only the most attractive but also the loftiest of human occupations. He devoted himself to that with a single purpose. He sought no popularity or fame by any other path. Certainly, certainly, his life was fortunate. It lasted to a good old age. But the summons came for him when his eye was not dimmed nor his natural force abated. He drank of the cup of the waters of life while it was sweetest and clearest, and was not left to drink it to the dregs. He was fortunate also, almost beyond the lot of humanity, in that by a rare felicity the greatest joy of youth came to him in an advanced age. Everything that can make life honorable, everything that can make life happy — honor, success, the consciousness of usefulness, the regard of his countrymen, and the supremest delight of family life — all were his. His countrymen take leave of him as another of the great and stately figures in the long and venerable procession of American judges.